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Beyond Purpose: Addressing State Discrimination in Interstate Commerce

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* Associate Professor of Law, California Western School of Law; J.D. Harvard, 1986; B.A. University of Virginia, 1983. I am indebted to my elders in the Commerce Clause "priesthood"—Mark Tushnet, Daniel A. Farber, Earl Maltz, and Steven Breker-Cooper—for their comments and guidance. I am also grateful to my California Western School of Law colleagues—Michal Belknap, Tom Barton and Barbara Cox—for their comments and support. Aside from fellow academics, I wish to thank my dutiful research assistants—Jennifer Cusick, Kosia Tulumello, William M. Berman, Rita Barnett, Thomas Riser, Jennifer Silvey, Laura Allen, and Jamilla Moore—for their insights and fresh perspective. Ultimately, no scholar creates alone. However, all errors herein are my own.

> The century-old question concerning the effect of the commerce clause on the power of the states, either to regulate or to tax interstate commerce, is being considered anew in the Supreme Court. . . . [W]hat, if anything, have the courts to do with cases involving state action contested on the ground that it interferes with interstate commerce? Do such cases raise justiciable questions? Or are they political in character, determinable solely by Congress in the exercise of its power under the commerce clause?[1]

"Forgive me. I am confused by shadows."[2]

I. INTRODUCTION

Giving meaning to the shadows cast by the congressional commerce power has proven elusive. On its face, the Commerce Clause makes the clear statement that Congress shall have the power to regulate commerce among the several states.[3] The Supremacy Clause[4] establishes the clear principle that

1. Noel T. Dowling, *Interstate Commerce and State Power*, 27 VA. L. REV. 1, 1 (1940).

2. MAN OF LA MANCHA (Metro-Goldwyn-Mayer 1972) (spoken by Don Quixote on his death bed).

3. U.S. CONST. art. I, § 8, cl. 3 (Congress shall have the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes"). Questions about the scope of the Commerce Clause, although contentious prior to the New Deal, have been deemed more or less settled in light of Wickard v. Filburn, 317 U.S. 111, 128-29 (1942) (holding that the scope of the Commerce Clause extends to wheat grown for home consumption); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258 (1964) (holding that a motel has a sufficient impact on commerce to be covered by congressional legislation); and Perez v. United States, 402 U.S. 146, 156-57 (1971) (holding that the scope of congressional power under the

states cannot regulate contrary to congressional action.[5] What remains unclear, however, are the myriad shadows cast by the Commerce Clause on the state's power to regulate commerce in the absence of congressional action. This jurisprudence is commonly referred to as the "dormant" Commerce Clause.[6]

A method to reconcile dormant Commerce Clause cases can be sewn from the threads of wisdom that weave their way through the jurisprudence and critical commentary. While there is widespread agreement that the doctrine is incoherent, justices and scholars disagree among themselves as to the way out of the muddle. Simply put, the law fails to ask and answer in a consistent way where the line should be drawn between permissible and impermissible regulation under the dormant Commerce Clause.

This Article proposes that the Court ask whether a regulation discriminates in effect against interstate commerce: Does a regulation disadvantage commercial interests outside the state? If so, then whether a regulation should be presumed permissible or impermissible should flow from the character of the regulation. The Court traditionally has upheld health and safety measures; thus, such regulations should be presumed permissible absent contrary evidence of discriminatory economic effect and a discriminatory purpose. If a regulation can be fairly characterized as an economic regulation in effect, then the Court should presume the regulation invalid given the Court's traditional concern about discriminatory economic measures in effect. Of course, this presumption could be overcome by providing contrary evidence of the health and safety effects furthered by the measure and the absence of a discriminatory purpose. In the difficult case of a mixed effect regulation, the Court should apply a predominant health and safety effect test similar to the predominant public purpose doctrine used in Takings Clause jurisprudence.[7]

Commerce Clause extends to loansharking).

4. U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . .").

5. *See, e.g.*, Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 203 (1983) ("It is well-established that within Constitutional limits Congress may preempt state authority by so stating in express terms." (citing Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977)); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 211 (1824) ("In every such case, the act of Congress, or the treaty, is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it.").

6. *See, e.g.*, C & A Carbone, Inc. v. Town of Clarkstown, 114 S. Ct. 1677, 1687-88 (1994) (O'Connor, J., concurring); Quill Corp. v. North Dakota, 112 S. Ct. 1904, 1911 (1992); CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69, 87 (1987).

7. *See, e.g.*, Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 239-44 (1984) ("[W]here the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause." *Id.* at 241.)

The advantage of this model is a link between the traditional concerns of the Court and the root concept of discrimination in effect. This synthesis connects future doctrine to past judicial decisionmaking. From the root of preventing discrimination in effect as a constitutional objective has grown the trunk of the Commerce Clause and the limbs of judicially developed limitations. Some limitations have been tried and discarded as unworkable. Other limitations, such as the discrimination rule and the balancing test for stemming undue burdens on commerce, survive. The next generation of growth in the doctrine must look beyond fiction to discrimination in effect against interstate commerce. This growth is necessary if the root of preventing discrimination in effect is to hold fast through the Commerce Clause and commercial challenges of tomorrow.

Under current law, the Court will ask whether a regulation discriminates against[8] or unduly burdens[9] interstate commerce. What the Court does not ask is where the line should be drawn between permissible and impermissible state discrimination. As a result, the Court has failed to produce a clear jurisprudence defining the permissible limits of state discrimination. This problem can be remedied if the Court adopts a discrimination in effects approach for separating permissible from impermissible discrimination. Discrimination in effect means state-induced disadvantage to commercial interests outside the state. This approach would produce more consistent and

8. While the Court has failed to define discrimination in clear, unqualified terms within the context of the Commerce Clause, Professor Donald Regan's assessment that discrimination means a form of protectionism, see Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause,* 84 MICH. L. REV. 1091, 1093 n.3 (1986) seems to fit what the Court has meant. *See* Maine v. Taylor, 477 U.S. 131, 138, 143-44, 151 (1986) (upholding a regulation discriminatory on its face despite evidence of protectionism because of the unavailability of nondiscriminatory alternatives and the presence of a legitimate local purpose); Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 350-51 (1977) (holding a regulation to be discriminatory because it had the effect of raising costs for foreign interests, thus disadvantaging commercial interests outside the state while benefiting commercial interests within the state); City of Philadelphia v. New Jersey, 437 U.S. 617 (1978) (finding it unnecessary to resolve the issue of discriminatory purpose because the regulation was discriminatory "[b]oth on its face and in its plain effect"); Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 460, 471 (1981) (holding that although the trial court found that the "actual basis" of the regulation was protectionist, the Court found no discrimination because the regulation applied uniformly to all producers); Dean Milk Co. v. City of Madison, 340 U.S. 349, 353-54 (1951) (holding that a regulation, while free of discriminatory purpose, was discriminatory in effect because it excluded milk produced and pasteurized in Illinois from being distributed and sold in Madison, Wisconsin).

9. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (holding that whether a facially neutral regulation enacted for a legitimate local purpose unduly burdens interstate commerce depends upon whether "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits" (citing Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 443 (1960))).

predictable results than the current doctrine of the Court.

Of course, a discrimination-in-effects approach could produce a different result in some cases than would be reached under the current law. Questions asked by the Court currently need not recognize the real discriminatory impact on interstate commerce.[10] Moreover, even if the Court acknowledges discrimination in effect on interstate commerce, the regulation may still be upheld if the state demonstrates that no less restrictive alternatives existed to serve a legitimate local purpose.[11]

Part II of this Article begins with a summary of the jurisprudence concerning the Commerce Clause in its dormant state. Part III presents a series of proposals from the critical literature. Part IV outlines a system for gauging discriminatory effects against interstate commerce. Part V demonstrates how a discriminatory effects approach would work in practice. Part VI examines the advantages of a discrimination in effect model. Finally, Part VII concludes my argument.

II. THE JURISPRUDENCE OF THE DORMANT COMMERCE CLAUSE

While scholars and justices have not always agreed among themselves about the purpose of the commerce power, one objective of the power to regulate commerce among the states must be the removal of impediments to trade. Subsection II.A. will show that other explanations of the Commerce Clause are less appealing and less sound. Subsection II.B. will discuss questions asked by the modern Court in its review of state regulations. Because the Court fails to ask where the line should be drawn between permissible and impermissible state discrimination, many Commerce Clause decisions lack the clarity of the proposed case analysis. A review of the caselaw will reveal that none of the doctrines used by the Court is successful because the rules themselves have proven uncertain in application.[12]

A. The Vision Behind the Dormant Commerce Clause

Before reviewing the Commerce Clause jurisprudence, one must

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10. *See, e.g.*, Exxon Corp. v. Governor of Md., 437 U.S. 117, 126 n.16 (1978) (indicating that the Court said it is permissible to discriminate as long as there is "no demonstrable effect whatsoever on the interstate flow of goods").

11. *Taylor*, 477 U.S. at 138 (quoting Hughes v. Oklahoma, 441 U.S. 311, 336 (1979)).

12. Tyler Pipe Indus. v. Washington State Dep't of Revenue, 483 U.S. 232, 259-60 (1987) (Scalia, J., dissenting) (noting that the Court's applications of the dormant Commerce Clause since the doctrine was adopted have made no sense); CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69, 87 (1987) (observing that "interpretation of 'these great silences of the Constitution' has not always been easy to follow" (quoting H.P. Mood & Sons, Inc. v. Du Mond, 336 U.S. 525, 535 (1949)).

understand the aim of the commerce power. A clear objective of the commerce power is to facilitate the removal of trade barriers.[13] This Subsection will explain why this conception of the Commerce Clause is more sensible than the alternatives.[14] Other interpretations may be plausible but they are less free from doubt than a concrete purpose of eliminating trade barriers.

Several factors suggest that a concern with free trade was the motivation. First, the Commerce Clause has its roots in the inability of the national government under the Articles of Confederation to address barriers blocking interstate trade.[15] Before adoption of the Constitution, a majority of states "levied tariffs on imports."[16] These state's regulations were protectionist against out-of-state interests[17] and were inconsistent in the amount of

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13. For example, see Justice Jackson's opinion for the Court in H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525 (1949):

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his export, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any.

Du Mond, 336 U.S. at 539; *see also* Commonwealth Edison Co. v. Montana, 453 U.S. 609, 618 (1981) ("[T]he very purpose of the Commerce Clause was to create an area of free trade among the several states.'" (quoting McLeod v. J. E. Dilworth Co., 322 U.S. 327, 330 (1944))); Great Atl. & Pac. Tea Co. v. Cottrell, 424 U.S. 366, 370-71 (1976) (observing that the purpose of the Commerce Clause is to foster free trade). *But see* Edward W. Kitch, Regulation and the American Common Market, *in* REGULATION, FEDERALISM, AND INTERSTATE COMMERCE 9, 15-19 (A. Dan Tarlock ed. 1981) (questioning the extent of protectionism among the states under the Articles of Confederation).

14. Some scholars have argued that the Commerce Clause is best understood from a political process standpoint. In reviewing regulations, the Court should be guided by a need to remedy defects in the legislative process. *See* Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425 (1982); Mark Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 WISC. L. REV. 125 (1979) [hereinafter *Rethinking*].

Tushnet might now be open to an alternative conception: The commerce power is an opportunity for cementing "national citizenship." *See* Letter from Mark Tushnet, Associate Professor of Law, Georgetown University Law School, to Winkfield F. Twyman, Jr., Associate Professor of Law, California Western School of Law, (April 18, 1994) (on file with author) [hereinafter *Tushnet Letter*].

15. *See* ANDREW C. MCLAUGHLIN, THE CONFEDERATION AND THE CONSTITUTION, 1783-1789 86-87, 173-74, 261-62 (1905); RICHARD B. MORRIS, THE FORGING OF THE UNION: 1781-1789 148-52 (1987); Albert S. Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 MINN. L. REV. 432, 442-446 (1941).

For an interesting and vigorous difference of opinion about trade barriers under the Articles of Confederation, see Richard B. Collins, *Economic Union as a Constitutional Value*, 63 N.Y.U. L. REV. 43, 57-58 (1988) and Kitch, *supra* note 13, at 15-19.

16. MORRIS, *supra* note 15, at 148.

17. *See, e.g., id.* at 149-50.

protection offered to home state industry and in the objectives pursued.[18]

Second, "nearly universal agreement" existed among the delegates to the Constitutional Convention that Congress must have the power to regulate interstate commerce.[19] Delegates were weary of trade wars and commercial gamesmanship.[20] Without a national power to remove trade barriers, the new Constitution might have suffered the same fate as the Articles of Confederation.[21]

Third, the Court has been guided by a recognition that impediments to interstate commerce must be addressed if Congress has failed to regulate.[22] Using *Du Mond* as an example, the Court has been sensitive to a "deeply rooted" theme: states may not "retard, burden or constrict the flow of . . . commerce for their economic advantage."[23] While some question whether the Court should interpret the dormant Commerce Clause as a threshold matter, the general consensus is that a healthy flow of commerce has been good for the prosperity of the country.[24]

Finally, trade barriers are readily identifiable. Customarily, the Court has to decide upon the constitutionality of regulations that clearly raise the costs of doing business,[25] quarantine the state from entering goods,[26] prohibit the exportation of commercial items,[27] protect in-state industries from interstate competition,[28] or retard the transportation of products across state lines.[29] In all of these instances, the barriers to trade can be quantified in economic

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18. *Id.* at 149.

19. Abel, *supra* note 15, at 443-44.

20. *See, e.g., id.* at 449 n.70 ("Does one of the states attempt to raise a little money by imports or other commercial regulations? A neighbouring state immediately alters her laws, and defeats the revenue by throwing the trade into a different channel. Instead of supporting or assisting, we are uniformly taking the advantage of one another." (quoting Hugh Williamson, *Remarks on the New Plan of Government, in* ESSAYS ON THE CONSTITUTION OF THE UNITED STATES 393, 403 (Paul L. Ford, ed., 1892)).

21. *See, e.g., id.* at 444 ("The proponents of the new system consistently dwelt on the lack of such power as one of the chief circumstances which had rendered needful a re-constitution of the federal arrangement . . . .").

22. *See* Collins, *supra* note 15, at 63.

23. *Du Mond*, 336 U.S. at 533.

24. Even Professor Kitch would share in this assessment though he would take great exception to the instrumental means of reaching this prosperity. *See* Collins, *supra* note 15, at 124-26.

25. *See infra* footnote and text accompanying footnote.

26. *See, e.g.*, Maine v. Taylor, 477 U.S. 131 (1986); City of Philadelphia v. New Jersey, 437 U.S. 617 (1978).

27. *See, e.g.*, Hughes v. Oklahoma, 441 U.S. 322 (1979).

28. *See, e.g.*, Lewis v. BT Inv. Managers, Inc., 447 U.S. 27 (1980); *Hunt*, 432 U.S. 333; *Dean Milk Co.*, 340 U.S. 349.

29. *See, e.g.*, Kassel v. Consol. Freightways Corp., 450 U.S. 662 (1981); *Pike*, 397 U.S. 137; Southern Pac. Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761 (1945); Bowman v. Chicago & N.W. Ry., 125 U.S. 465 (1888).

terms. For example, the North Carolina regulation in *Hunt* "stripp[ed] away from the Washington apple industry the competitive and economic advantages it ha[d] earned for itself through its expensive inspection and grading system."[30] The regulation prevented Washington apple growers from affixing Washington apple grade labels on closed containers of apples shipped into North Carolina in spite of the preference of apple brokers, dealers, and customers for Washington grade apples.[31] The Court quite easily grasped the regulation's impact on trade between Washington and North Carolina.

For these reasons, there can be little doubt that the commerce power is designed to further free trade. Moreover, the Court has successfully interpreted the Commerce Clause with this vision in mind. As a result, states are aware that ruthless protectionism will not be permitted in the marketplace. Not only is free trade the goal animating the Commerce Clause,[32] but it also explains the positions the Court has taken in this area.

Some commentators have suggested that the political process offers a better way of understanding the dormant Commerce Clause.[33] Rather than focus on a substantive value such as free trade, these commentators believe the Court should review the legislative process for indications that out-of-state interests have been disadvantaged.[34] While a process-based model is appealing because, presumably, states should not take advantage of outsiders,[35] it raises several difficulties nonetheless.

First, out-of-state commercial interests might be well-represented in the legislative halls of state governments.[36] A series of recent stories has documented the influence-peddling by monied interests without regard to political party or affiliation.[37] In a particularly striking example, commercial

30. *Hunt*, 432 U.S. at 351.

31. *Id.*

32. *Contra* Eule, *supra* note 14, at 434-35 (explaining that the common misconception of a free trade model in dormant Commerce Clause jurisprudence derives from the historical coincidence that protectionism begat the Constitutional Convention).

33. *See id.* at 437-43; *Rethinking*, *supra* note 14, at 130-31.

34. *See, e.g.*, South Carolina State Highway Dep't v. Barnwell Bros., 303 U.S. 177, 185 n.2 (1938). Speaking for the Court, Justice Harlan Stone cautioned that the Court had a special responsibility when the legislative process malfunctioned to the detriment of out-of-state interests: "[W]hen the regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state." *Id.* (citations omitted).

35. *See, e.g.*, Bendix Autolite Corp. v. Midwesco Enters., 486 U.S. 888, 893 (1988); *Dean Milk Co.*, 340 U.S. 349, 354; Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 522 (1935). *But see Commonwealth Edison Co.*, 453 U.S. at 617-19 (upholding state severance tax even though 90% of the tax burden fell on citizens of other states).

36. *See infra* text accompanying notes 37-38.

37. *See infra* note 239 and accompanying text.

interests lobbying for specific bills in New York gave $920,050 of the combined $1.3 million raised by the Democratic and Republican parties in both houses of the legislature.[38] Second, an emphasis on the political process misreads the nature of the commerce power. Professor Collins sensibly argues that the commerce power is not anchored around majoritarian concerns of democratic rights.[39] While political process models are understandable in the context of personal rights, the issue of whether state *X* can regulate *Y* commercial activity implicates structural concerns. In other words, does the structure of the Constitution fence out state regulation of *Y* activity? Answering this question is not easy, but the answer does not bear upon the relationship of a citizen to a state; rather, the answer flows from the relationship of the state to the national government. Finally, the political process model for understanding the Constitution has been called into serious question.[40] The theory is problematic because not everyone agrees that participation in the political process is a basic value.[41] This lack of consensus makes one wary about the principled foundation supporting the political process conception.

Professor Tushnet has raised an alternative method of understanding the dormant Commerce Clause: the power "is designed to create something like a sense of national citizenship."[42] If one accepts this position, then the dormant Commerce Clause should ban intentional or facial discrimination only and not perceived discrimination in effect against commercial interests.

While the jurisprudence could be explained as the Court's development of a national entity, several troubling concerns come to mind. This argument is problematic because it is doubtful that such a design existed in the minds of the drafters of the Commerce Clause and less certain that contemporary courts aim toward such a goal. The framers of the Constitution knew how to advance national unity as indicated by the Supremacy Clause and more broadly by the creation of a strong central government. Of course, the power to regulate commerce among the several states furthers national unity, but a stronger argument can be made that the design behind the dormant Commerce Clause tackles the more concrete problem of removing state impediments to interstate commerce. The limited remarks about the Commerce Clause at the Constitutional Convention indicate a general frustration with destructive tariffs

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38. *See infra* note 239.

39. Collins, *supra* note 15, at 111.

40. *See, e.g.*, Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980); Mark Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037 (1980).

41. Tushnet, *supra* note 40, at 1045-46.

42. *Tushnet Letter*, *supra* note 14, at 1. I should quickly add that this position might not represent Tushnet's current thinking about the dormant Commerce Clause but rather a plausible challenge to a free trade perspective.

and trade wars, not a specific call for national citizenship.[43]

Contemporary courts are as likely to bless state's attempts to make their own way as they are to bless a vision of national unity. *Kassel*,[44] *Hunt*,[45] and *Dean Milk Co.*[46] support the national unity proposition, but *Taylor*,[47] *Exxon Corp.*,[48] and *Clover Leaf*[49] assuredly undercut the notion that states should not venture out on their own. The argument that contemporary courts use the dormant Commerce Clause to bolster national unity explains just part of the judicial story. For these reasons, the national unity vision is less satisfying for understanding the dormant Commerce Clause than the simple aim of promoting a national market free from disruptive state regulation.

B. The Modern Caselaw

Understanding the response of the modern Court to this doctrinal quandary must begin with Justice Harlan Fiske Stone. In *Di Santo v. Pennsylvania*[50] Justice Stone began a long campaign against the distinction between direct and indirect.[51] Before *Di Santo* the Court examined whether a state's regulation had produced a direct or indirect impact on interstate commerce. These labels proved untrustworthy for drawing a line between permissible and impermissible regulation. Therefore, Stone advised that one must consider

> all the facts and circumstances, such as the nature of the regulation, its function, the character of the business involved and the actual effect on the flow of commerce, [to reach] the conclusion that the regulation concerns interests peculiarly local and does not infringe the national interest in maintaining the freedom of commerce across state lines.[52]

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43. *See supra* notes 15-21 and accompanying text.

44. 450 U.S. 662 (1981) (holding that a restriction on 65-foot double-trailer truck violated the Commerce Clause).

45. 432 U.S. 333 (1977) (holding that a state statute prohibiting the placement of Washington apple grade labels on closed containers imported into the state violated the Commerce Clause).

46. 340 U.S. 349 (1951) (holding that a city ordinance requiring milk sold within the city limits to be processed within a defined radius violated the Commerce Clause).

47. 477 U.S. 131 (1986) (holding that the state of Maine could prohibit the importation of nonnative baitfish).

48. 437 U.S. 117 (1978) (holding that the state of Maryland could prohibit affiliates of refiners from operating service stations within the state).

49. 449 U.S. 456 (1981) (holding that the state of Minnesota could prohibit the sale of milk in plastic containers).

50. 273 U.S. 34 (1927), *overruled on other grounds by* California v. Thompson, 313 U.S. 109 (1941).

51. *See id.* at 44 (Stone, J., dissenting).

52. *Id.*

While Stone reasoned in terms of "local" and "national" interests, he had begun the intellectual move toward a multi-factor analysis.

In *South Carolina State Highway Department v. Barnwell Bros.*[53] Justice Stone offered the beginnings of a reasonableness standard for review of a state's regulations. South Carolina had enacted a regulation prohibiting trucks exceeding a width of ninety inches and a gross weight of 20,000 pounds from using state highways.[54] Several truckers and interstate shippers brought suit against state officials to enjoin enforcement of the regulation as an unconstitutional burden on interstate commerce.[55] The three-judge district court ruled against the state, holding that "the weight and width prohibitions place an unlawful burden on interstate motor traffic passing over specified highways of the state."[56] The state appealed the adverse ruling.

Speaking for a unanimous Court, Justice Stone set out a new reasonableness approach for deciding whether a state regulation is permissible.[57] In the absence of congressional legislation, "the judicial function, under the commerce clause as well as the Fourteenth Amendment, stops with the inquiry whether the state legislature in adopting regulations such as the present has acted within its province, and whether the means of regulation chosen are reasonably adapted to the end sought."[58] On the first point, Stone concluded without analysis that "a state may impose non-discriminatory restrictions with respect to the character of motor vehicles moving in interstate commerce as a safety measure and as a means of securing the economical use of its highways."[59] On the second point, Stone concluded that the regulation had

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53. 303 U.S. 177 (1938).

54. *Id.* at 180.

55. *Id.* at 181.

56. *Id.* The trial court had based its decision on findings

> that there is a large amount of motor truck traffic passing interstate in the southeastern part of the United States, which would normally pass over the highways of South Carolina, but which will be barred from the state by the challenged restrictions if enforced, and upon its conclusion that, when viewed in light of their effect upon interstate commerce, these restrictions are unreasonable.

Id. at 182.

57. *But see* Dowling, *supra* note 1, at 9 ("The test has the familiar ring of *Cooley v. The Board.*"). In Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851), the Court held that whether an activity could be regulated depended upon the character of the activity. *Cooley*, 53 U.S. (12 How.) at 319-20. Some activities would require a single, uniform national rule while other activities could be regulated by the state. *Cooley*, 53 U.S. (12 How.) at 319-20.

58. *Barnwell Bros.*, 303 U.S. at 190 (citing Sproles v. Binford, 286 U.S. 374 (1932) and Stephenson v. Binford, 287 U.S. 251, 272 (1932)).

59. *Id.* at 190. Dowling questions Stone's conclusory analysis on this point:

> But what was the meaning of the requirement, which South Carolina apparently

some rational relationship to the legislative end of "safe and economical use of highways."[60]

1. The Balancing Approach

Two years after the *Barnwell* decision, Professor Dowling (who would become the Harlan Fiske Stone Professor of Law at Columbia) criticized the direct-indirect approach as "far from satisfying" because of its reliance on mere labels and mechanical tests.[61] Dowling also questioned the *Cooley* vision of the justification for judicial intervention in dormant Commerce Clause cases. In Dowling's view, the proper justification for intervention should be when a state's regulation produces an "unreasonable interference" with commerce.[62] To define "unreasonable interference" in Dowling's formulation required a balancing of national and local interests followed by a judgment determining which interest should prevail.[63]

Professor Gunther speculates that Dowling's definitive article might have influenced the Court's decision to adopt a balancing approach for dormant Commerce Clause cases.[64] In *Southern Pacific Co. v. Arizona ex rel. Sullivan*,[65] the Court heard a challenge to an Arizona law prohibiting trains of more than fourteen passenger cars or seventy freight cars from operating within the state.[66]

Justice Stone reversed the Arizona Supreme Court, holding that the proper inquiry was not "whether there is basis for the conclusion . . . that the [prohibited conduct] ha[d] an adverse impact upon safety of operation."[67] Rather, the decisive question was whether "the total effect of the law as a safety measure in reducing accidents and casualties [was] so slight or problematical as not to outweigh the national interest in keeping interstate commerce free from interferences which seriously impede it . . . ."[68] Stone

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> satisfied, that the State act "within its province"? It was met here, said the Court, by previous decisions upholding state restrictions with respect to the character of motor vehicles moving in interstate commerce, designed to insure safe and economical use of highways. But the question, why have such laws been upheld, went unanswered.

Dowling, *supra* note 1, at 9.

60. *Barnwell Bros.*, 303 U.S. at 184, 192-96.

61. Dowling, *supra* note 1, at 6-7.

62. *Id.* at 20.

63. *Id.* at 21.

64. *See* GERALD GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 32 (12th ed. 1991).

65. 325 U.S. 761 (1945).

66. *Id.* at 763.

67. *Id.* at 775.

68. *Id.* at 775-76.

meticulously reviewed the trial court findings of fact and concluded "that the Arizona Train Limit Law, viewed as a safety measure, affords at most slight and dubious advantage, if any, over unregulated train lengths."[69] The number of "slack action"[70] accidents in Arizona approximated the accident rate in Nevada where train lengths were not regulated.[71] Perhaps most damning to the state's case was the trial court's finding that the law requiring shorter trains would actually raise the accident rate because of the increased number of trains in operation.[72]

Stone's balancing approach advanced the Court's ability to decide whether state regulations were permissible because, unlike earlier approaches, the Court could emphasize facts and not labels. To this extent, Dowling's hopes for better guidance have been realized.[73] The balancing approach has proven resilient, and the modern Court continues to weigh the state's benefits against the burdens on interstate commerce.[74] Yet, while an improvement over the direct-indirect effects test, the modern balancing approach has fallen short of

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69. *Id.* at 779.

70. Justice Stone discussed "slack action" in analyzing the weight of Arizona's safety interest in its regulation:

> The principal source of danger of accident from increased length of trains is the resulting increase of "slack action" of the train. Slack action is the amount of free movement of one car before it transmits its motion to an adjoining coupled car. . . . The length of the train increases the slack since the slack action of a train is the total of the free action movement between its several cars. The amount of slack action has some effect on the severity of the shock of train movements, and on freight trains sometimes results in injuries to operatives . . . . The amount and severity of slack action, however, are not wholly dependent upon the length of the train . . . .

Southern Pac., 325 U.S. at 776-77.

71. *Id.* at 777.

72. *Id.* at 777-78.

73. *See* Dowling, *supra* note 1, at 19-20.

74. For a representative overview of the modern Court's reliance "on an ad hoc balancing of interests based on the *particular facts of each case,*" see Earl M. Maltz, *How Much Regulation Is Too Much—An Examination of Commerce Clause Jurisprudence*, 50 GEO. WASH. L. REV. 47, 48-49, 58-64 (1981) (emphasis added) (footnote omitted).

Since the Court's adoption of the balancing approach for dormancy issues in *Southern Pacific*, many commentators have roundly criticized balancing as inherently uncertain in application. *See id.* at 48 (citing Louis Henkin, *Infallibility Under Law: Constitutional Balancing*, 78 COLUM. L. REV. 1022, 1047 (1978); Gary C. Leedes, *The Supreme Court Mess*, 57 TEX. L. REV. 1361, 1415-21 (1979); and *Rethinking*, *supra* note 14, at 128). For an additional critique that nicely questions the weighing of burdens on interstate commerce and benefits to the state as an instrument for dormant Commerce Clause adjudication, see Maltz, *supra* at 58-64.

I agree that the balancing approach will not bring order to the jurisprudence. Order implies being able to obtain a predictable result from the application of doctrine, which is inconsistent with the underlying point of balancing: the weighing of burdens and benefits to reach tailor-made outcomes.

its early promise to instill order in dormant Commerce Clause jurisprudence. On many occasions, the Court lays out the balancing rule but then decides that the regulation impermissibly burdens interstate commerce or that the benefit from the regulation outweighs incidental or permissible effects on interstate commerce. Unfortunately, the Court fails to provide state lawmakers with a clear guide to the difference between permissible and impermissible regulation.[75]

The inherent difficulties of the balancing approach are illustrated by *Kassel v. Consolidated Freightways Corp.*[76] Unlike all other states in the West and Midwest, Iowa chose to prohibit the general use of sixty-five-foot double trucks within its borders.[77] The Iowa regulation specifically restricted most truck combinations to fifty-five feet in length.[78] However, the regulation did permit special trailers called doubles, mobile homes, trucks carrying vehicles such as tractors and other farm equipment, and singles hauling livestock to be as long as sixty feet.[79] The State justified its measure as a reasonable safety regulation.[80]

Because of the regulation, Consolidated Freightways could not use its sixty-five-foot doubles to move goods through Iowa.[81] Instead, the company could choose one of these options: "(i) use 55-foot singles; (ii) use 60-foot doubles; (iii) detach the trailers of a 65-foot double and shuttle each through

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75. *See* Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 897 (1988)(Scalia, J., concurring) (arguing that balancing burdens on commerce with benefits to a state "is more like judging whether a particular line is longer than a particular rock is heavy").

76. 450 U.S. 662 (1981) (plurality opinion). While *Kassel* is superb for illustrating the problems with a balancing approach, other cases could be used to make the same general point. For examples, see Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981); Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429 (1978); Pike v. Bruce Church, Inc., 397 U.S. 137 (1970); Morgan v. Virginia, 328 U.S. 373 (1946); *Southern Pac.*, 325 U.S. 761.

77. *Kassel*, 450 U.S. at 665. Justice Powell explained the differences between Consolidated's two types of trucks as follows:

> Consolidated mainly use[d] two kinds of trucks. One consist[ed] of a three-axle tractor pulling a 40-foot two-axle trailer. This unit, commonly called a single, or "semi," [was] 55 feet in length overall. Such trucks ha[d] long been used on the Nation's highways. Consolidated also use[d] a two-axle tractor pulling a single-axle trailer which, in turn, pulls a single-axle dolly and a second single-axle trailer. This combination, known as a double, or twin, [was] 65 feet long overall.

Id. (footnote omitted).

78. *Id.*

79. *Id.* at 665-66 (footnotes omitted) (citing IOWA CODE § 321.457(3)-(6) (1979)). Iowa amended its law to permit all singles to be as large as 60 feet after the lower courts' decisions. *Id.* at 666.

80. *Kassel*, 450 U.S. at 667 ("The State asserted that 65-foot doubles are more dangerous than 55-foot singles . . . .").

81. *Id.*

the State separately; or (iv) divert 65-foot doubles around Iowa."[82] Rejecting these options, Consolidated challenged the Iowa regulation as an unconstitutional burden on interstate commerce.[83]

The Court applied a balancing standard and concluded that the Iowa regulation impermissibly burdened interstate commerce.[84] In reaching this conclusion, the Court failed to illuminate the amount of safety benefit that would insulate a state's regulation from challenge.[85] Instead, the Court merely reasoned that "'[t]he *total effect* of the law as a safety measure in reducing accidents and casualties is so slight and problematical that it does not outweigh the national interest in keeping interstate commerce free from interferences that seriously impede it.'"[86] Justice Powell in his majority opinion dismissed the safety interest as a mere illusion not warranting protection by the Court.[87]

Implicit in Justice Powell's opinion are several unresolved issues as to the scope of the balancing test. For example, what facts would be sufficiently weighty to move a regulation from the category of "illusory" to "nonillusory"? Would "illusory" safety regulations be permissible if the impact on interstate commerce were sufficiently "light"? Similarly, Justice Rehnquist's dissent fails to take the up the matter of limits in the balancing test. Although Rehnquist does identify the real problem that "[*Kassel*] gives no guidance whatsoever to these States as to whether their laws are valid or how to defend them,"[88] he fails to resolve the problem.

Kassel is especially problematic because of an earlier challenge to a similar Wisconsin law. The Court in *Raymond Motor Transportation, Inc. v. Rice*[89] struck down a regulation barring trucks longer than fifty-five feet from Wisconsin's highways under a balancing test.[90] While concluding that the regulation placed a substantial burden on interstate commerce with only the most speculative contribution to highway safety, the Court left unresolved the issue whether a similar regulation would be upheld if evidence produced on safety "were not so overwhelmingly one-sided."[91] Like the petitioner in

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82. *Id.*

83. *Id.*

84. *Id.* at 670-71.

85. *Kassel*, 450 U.S. at 670 (observing that the extent of permissible state regulation is not always easy to measure, even though regulations that touch upon highway safety are most protected from judicial scrutiny).

86. *Id.* at 668 (quoting the reasoning of the trial court in Consolidated Freightways v. Kassel, 475 F. Supp. 544, 551 (1979)).

87. *Id.* at 671.

88. *Id.* at 706 (Rehnquist, J., dissenting).

89. 434 U.S. 429 (1978).

90. *Id.* at 443-48.

91. *Id.* at 447.

Seaboard Air Line Railway Co. v. Blackwell,[92] Iowa responded to the Court's speculations and produced extensive evidence of safety benefits flowing from the truck length restrictions.[93] If Iowa did not make a sufficient showing of safety benefits in light of *Raymond*, it might well be impossible in effect for a state to regulate highway safety against a commerce challenge. As Justice Rehnquist noted in dissent: "The result in this case suggests, to paraphrase Justice Jackson, that the only state truck-length limit 'that is valid is one which this Court has not been able to get its hands on.'"[94]

Adding to the confusion of *Kassel* is the clear precedent set in *Barnwell Bros.* that "'[i]n no field has . . . deference to state regulation been greater than that of highway safety.'"[95] Justice Stone in *Barnwell Bros.* quite clearly established a deferential level of review for state trucking regulations:

> In the absence of such legislation the judicial function, under the commerce clause . . . stops with the inquiry whether the state legislature in adopting regulations such as the present has acted within its province, and whether the means of regulation chosen are reasonably adapted to the end sought.[96]

Given the extensive evidence of safety benefits produced by Iowa, it is difficult to reconcile the *Kassel* outcome with the *Barnwell Bros.* precedent.

Thus far, the balancing approach has fallen short of providing clear guidance to states about the line between permissible and impermissible

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> Our holding is a narrow one, for we do not decide whether laws of other States restricting the operation of trucks over 55 feet long, or of double-trailer trucks, would be upheld if the evidence produced on the safety issue were not so overwhelmingly one-sided as in this case. The State of Wisconsin has failed to make even a colorable showing that its regulations contribute to highway safety.

Id. at 447-48 (footnote omitted).

92. 244 U.S. 310, 316 (1917).

93. For example, Iowa demonstrated that (1) "longer vehicles take greater time to be passed, thereby increasing the risks of accidents, particularly during the inclement weather not uncommon in Iowa"; (2) "[t]he 65-foot vehicle exposes a passing driver to visibility-impairing splash and spray during bad weather for a longer period than do the shorter trucks permitted in Iowa"; (3) "[l]onger trucks are more likely to clog intersections"; (4) "[l]onger vehicles pose greater problems at the scene of an accident"; (5) "doubles are more likely than singles to jackknife or upset;" and (6) "Consolidated's overall accident rate for doubles exceeded that of semis for three of the last four years and that some of Consolidated's own drivers expressed a preference for the handling characteristics of singles over doubles." *Kassel*, 450 U.S. at 694-95 (Rehnquist, J., dissenting) (citations omitted).

94. *Id.* at 687 (Rehnquist, J., dissenting) (quoting Jungersen v. Ostby & Barton Co., 335 U.S. 560, 572 (1949) (Jackson, J., dissenting)).

95. *Id.* at 690 (Rehnquist, J., dissenting) (quoting *Raymond*, 434 U.S. at 443).

96. *Barnwell Bros.*, 303 U.S. at 190 (1938) (citing *Sproles v. Binford*, 286 U.S. 374 (1932) and *Stephenson v. Binford*, 287 U.S. 251, 272 (1932)).

regulation. Iowa demonstrated safety benefits of its regulation, learning from Wisconsin's failure to do so in *Raymond*. Yet, the Court found the safety evidence wanting when weighed against the burden on interstate commerce. The Court seemingly disregarded the clear precedent of *Barnwell Bros.*[97] and engaged in an in-depth review of the Iowa regulation. Perhaps, the defect with the balancing approach can be best summed up by Rehnquist's dissent in *Kassel*:

> The other States with truck-length limits that exclude Consolidated's 65-foot doubles would not at all be paranoid in assuming that they might be next on Consolidated's "hit list." The true problem with today's decision is that it gives no guidance whatsoever to these States as to whether their laws are valid or how to defend them. For that matter, the decision gives no guidance to Consolidated or other trucking firms either. Perhaps, after all is said and done, the Court today neither says nor does very much at all. We know only that Iowa's law is invalid and that the jurisprudence of the "negative side" of the Commerce Clause remains hopelessly confused.[98]

2. The Discrimination Approach

When reviewing a state's regulations, the modern Court has also developed an alternative approach to the balancing test: determining whether a regulation discriminates against interstate commerce.[99] Once the Court

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97. The *Kassel* Court did attempt to distinguish *Barnwell Bros.* on the grounds that *Barnwell Bros.* involved state highway regulations: "The Court normally does accord 'special deference' to state highway safety regulations." *Kassel*, 450 U.S. at 675. (citation omitted). This distinction is not persuasive because it ignores the real effect on interstate commerce produced by South Carolina's regulation. The *Barnwell Bros.* Court accepted findings by the trial court that "there is a large amount of motor truck traffic passing interstate in the southeastern part of the United States, which would normally pass over the highways of South Carolina, but which will be barred from the state by the challenged restrictions if enforced . . . ." *Barnwell Bros.*, 303 U.S. at 182.

Thus, a sensible argument could be made that *Barnwell Bros.* must be viewed as an aberration in light of the outcomes in *Raymond*, *Kassel*, and Bibb v. Navajo Freight Lines, 359 U.S. 520 (1959).

98. *Kassel*, 450 U.S. at 706 (Rehnquist, J., dissenting) (footnote omitted). It should be noted that "Consolidated was a plaintiff in *Raymond* as well as this case." *Id.* at 706 n.14.

99. Bendix Autolite Corp. v. Midwesco Enter., 486 U.S. 888, 891 (1988); Maine v. Taylor, 477 U.S. 131, 138 (1986). *See* Exxon Corp. v. Governor of Md., 437 U.S. 117, 125 (1978); Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 353 (1977); Dean Milk Co. v. Madison, 340 U.S. 349 (1951). While the Court has not always been clear in defining discrimination, Professor Regan's argument that the Court really means protectionism is compelling. *See supra* note 8; City of Philadelphia v. New Jersey, 437 U.S. 617, 623-24 (1978):

> The opinions of the Court through the years have reflected an alertness to the evils of 'economic isolation' and protectionism, while at the same time recognizing

identifies discrimination against interstate commerce, the burden falls on the state to justify said discrimination.[100] The state must justify such discrimination "in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake."[101] The burden of justification for the state is high because the state must go beyond a mere showing of legitimate objective.[102]

As with the balancing approach, making sense of the discrimination approach has proved difficult. The following Subsections show that the Court has not always recognized discrimination in effect. Moreover, the Court has not been consistent with its inquiry into the safety benefits flowing from a discriminatory regulation or the availability of nondiscriminatory alternatives adequate to preserve the state's interests at stake. The following Subsections will begin with the Court's sensible application of the discrimination approach in *Hunt*, and then compare and contrast the Court's analysis in several representative cases: *Clover Leaf*, *Exxon Corporation*, and *Taylor*.

a. Hunt v. Washington State Apple Advertising Commission: *A Sensible Result*

Hunt v. Washington State Apple Advertising Commission is a paradigmatic case. "In 1972, the North Carolina Board of Agriculture adopted an administrative regulation, unique in the 50 States, which in effect required all

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> that incidental burdens on interstate commerce may be unavoidable when a State legislates to safeguard the health and safety of its people. Thus, where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected. . . . But where other legislative objectives are credibly advanced and there is no patent discrimination against interstate trade, the Court has adopted a much more flexible approach . . . .

Id. (citations omitted).

100. *Philadelphia*, 437 U.S. at 626-27; *Taylor*, 477 U.S. at 138; Lewis v. BT Inv. Managers, 447 U.S. 27, 36 (1980) (quoting *Philadelphia*, 437 U.S. at 626-27); *Hunt*, 432 U.S. at 353; *Dean Milk Co.*, 340 U.S. at 354.

101. *Hunt*, 432 U.S. at 353 (citations omitted). *See also* Great Atl. & Pac. Tea Co. v. Cottrell, 424 U.S. 366, 373 (1976); Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970); Polar Ice Cream & Creamery Co. v. Andrews, 375 U.S. 361, 375 n.9 (1964); *Dean Milk Co.*, 340 U.S. at 354.

102. *See Hunt*, 432 U.S. at 350 ("[A] finding that state legislation furthers matters of legitimate local concern, even in the health and consumer protection areas, does not end the inquiry."); *Dean Milk Co.*, 340 U.S. at 354.

> A different view, that the ordinance is valid simply because it professes to be a health measure, would mean that the Commerce Clause of itself imposes no limitations on state action other than those laid down by the Due Process Clause, save for the rare instance where a state artlessly discloses an avowed purpose to discriminate against interstate goods.

Id. (citation omitted).

closed containers of apples shipped into or sold in the State to display either the applicable USDA grade or a notice indicating no classification."[103] This regulation discriminated in effect against the State of Washington, the country's largest producer of apples, because Washington tested and graded apples under a system superior to the standards adopted by the United States Agriculture Department.[104] In response to the administrative regulation, "the Washington State Apple Advertising Commission petitioned the North Carolina Board of Agriculture to amend its regulation to permit the display of state grades."[105] Not only was relief denied but North Carolina in due course enacted its regulation into law.[106]

As would be expected from these facts, the Court identified several forms of discrimination produced by the regulation.[107] The Court first observed that the regulation raised "the costs of doing business in the North Carolina market for Washington apple growers and dealers, while leaving those of their North Carolina counterparts unaffected."[108] Secondly, the measure stripped the Washington apple industry of competitive and economic advantages earned through its expensive inspection and grading system.[109] Finally, the regulation had a "leveling effect" operating to the advantage of local apple producers.[110] While the regulation did not discriminate on its face, the Court looked beyond the mere language of the regulation to analyze the real effects on interstate commerce.

Having identified discrimination in effect caused by the regulation, the Court proceeded to review the justification for the regulation.[111] North Carolina, the Court concluded, had failed under the discrimination approach to demonstrate either local benefits from the statute or the unavailability of nondiscriminatory alternatives adequate to preserve the local interests.[112] While North Carolina had an interest in consumer protection, the challenged regulation did "remarkably little to further that laudable goal at least with respect to Washington apples and grades."[113] Moreover, the Court conclud-

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103. *Hunt*, 432 U.S. at 337.

104. *See id.* at 336. Washington established its rigorous quality control program "[b]ecause of the importance of the apple industry to the State." *Id.*

105. *Id.* at 338.

106. *Id.* at 339.

107. *Hunt*, 432 U.S. at 350-52.

108. *Id.* at 351.

109. *Id.*

110. *Id.* at 351-52.

111. *Id.* at 353. *Accord* Great Atl. & Pac. Tea Co. v. Cottrell, 424 U.S. 366, 373 (1976); Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970); Polar Ice Cream & Creamery Co. v. Andrews, 375 U.S. 361, 375 n.9 (1964); *Dean Milk Co.*, 340 U.S. 349, 354 (1951).

112. *Hunt*, 432 U.S. at 353-54.

113. *Id.* at 353. The Court observed that:

ed "that nondiscriminatory alternatives to the outright ban of Washington State grades [were] readily available."[114]

b. Minnesota v. Clover Leaf Creamery Co. *and* Exxon Corporation v. Governor of Maryland: *The Existence of Discrimination*

As opposed to *Hunt*, where the Court looked beyond facial and purposeful discrimination for evidence of discriminatory effects against interstate commerce, the Court in *Clover Leaf Creamery Co.*[115] failed to acknowledge purposeful discrimination. The facts in *Clover Leaf Creamery Co.* are intricate, but evidence of discrimination is clear nonetheless.

In 1977 Minnesota enacted a regulation "banning the retail sale of milk in plastic nonreturnable, nonrefillable containers, but permitting such sale in other nonreturnable, nonrefillable containers, such as paperboard milk cartons."[116] The regulation drew a key distinction on its face between plastic containers (forbidden under all circumstances) and paper, nonrefillable milk containers (not affected by the regulation).[117] Plastic nonrefillables, according to the Minnesota Supreme Court, are "high density polyethylene plastic container(s)" while paper containers are "composed of bleached kraft paper coated with low density polyethylene, a plastic . . . [which] comprises about 10 percent of the weight of the container."[118] The regulation on its face permitted the retail sale of containers containing less than fifty percent

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> although the statute is ostensibly a consumer protection measure, it directs its primary efforts, not at the consuming public at large, but at apple wholesalers and brokers who are the principal purchasers of closed containers of apples. . . . Since the statute does nothing at all to purify the flow of information at the retail level, it does little to protect consumers against the problems it was designed to eliminate.

Id. But see South Carolina v. Barnwell Bros., 303 U.S. 177, 190-92 (1938) (holding that the judicial inquiry does not extend to reasonableness, wisdom, and propriety of regulation but to whether regulation lacks a rational basis).

114. *Hunt*, 432 U.S. at 354. The Court raised the possibility of North Carolina's permitting out-of-state growers to utilize state grades only if they also marked their shipments with the applicable USDA label. In that case, the USDA grade would serve as a benchmark against which the consumer could evaluate the quality of the various state grades. If this alternative was for some reason inadequate to eradicate problems caused by state grades inferior to those adopted by the USDA, North Carolina might consider banning those state grades which, unlike Washington's, could not be demonstrated to be equal or superior to the corresponding USDA categories.

Id.

115. 449 U.S. 456 (1981).

116. *Id.* at 458 (citing MINN. STAT. § 116F.21 (1978)).

117. Clover Leaf Creamery Co. v. Minnesota, 289 N.W.2d 79, 81 (Minn. 1979).

118. *Id.* at 81 n.8, 81 n.9.

plastic but prohibited containers containing more than fifty percent plastic.[119] Representatives of the plastic industry brought an action against the regulation on Commerce Clause grounds.

In light of these facts, the *Clover Leaf Creamery Co.* Court failed to acknowledge that the regulation might have been an attempt to discriminate against interstate commerce. Why would the legislature distinguish between nonrefillable containers based solely on the percentage of plastic in the container? Ostensibly, the purpose of the regulation was to discourage the use of nonreturnable containers[120] but this purpose is undercut by the regulation's exemption for paper containers that are nonreturnable. Empirical evidence suggested the regulation would "prolong the use of ecologically undesirable paperboard milk cartons,"[121] thus impeding purported conservation objectives. Perhaps most troubling, the Minnesota District Court "found that, contrary to the statement of purpose in § 1, the 'actual basis' for the Act 'was to promote the economic interests of certain segments of the local dairy and pulpwood industries at the expense of the economic interests of other segments of the dairy industry and the plastics industry.'"[122] Without a rigorous analysis of this hint of discrimination, the U.S. Supreme Court concluded that the regulation did not "effect 'simple protectionism,' but 'regulate[d] evenhandedly' by prohibiting all milk retailers from selling their products in plastic, nonreturnable milk containers."[123] *Hunt* stands for the proposition that evenhanded or facially neutral regulations can be discriminatory in effect, but the *Clover Leaf Creamery Co.* Court seemed unwilling to search too deeply for discriminatory effects.

The Court also did not search deeply for discriminatory effects in *Exxon Corp.* v. *Governor of Maryland.*[124] Maryland had enacted a regulation

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119. *Id.* at 81.

120. The legislature finds that the use of nonreturnable, nonrefillable containers for the packaging of milk and other milk products presents a solid waste management problem for the state, promotes energy waste, and depletes natural resources. The legislature therefore, in furtherance of the policies stated in Minnesota Statutes, Section 116F.01, determines that the use of nonreturnable, nonrefillable containers for packaging milk and other milk products should be discouraged and that the use of returnable and reusable packaging for these products is preferred and should be encouraged.

MINN. STAT. § 116F.21 (1978), *quoted in Clover Leaf Creamery Co.*, 449 U.S. at 458-59.

121. *Clover Leaf Creamery Co.*, 449 U.S. at 460.

122. *Id.* (citation omitted). The Minnesota Supreme Court disagreed, however, and "found that the purpose of the Act was 'to promote the state in terests [sic] of encouraging the reuse and recycling of materials and reducing the amount and type of material entering the solid waste stream,' and acknowledged the legitimacy of this purpose." *Id.* at 460-61 (quoting *Clover Leaf Creamery Co.*, 289 N.W.2d at 82).

123. *Id.* at 471.

124. 437 U.S. 117 (1978).

prohibiting producers or refiners of petroleum products from operating retail service stations within the state.[125] Extensive evidence indicated that local dealers gained protection from interstate commerce under the regulation: (1) more than ninety-nine percent of in-state retail stations insulated from competition with out-of-state integrated firms were operated by local business interests[126] and (2) of the commercial interests excluded from commerce due to the regulation, ninety-five percent were out-of-state firms operating ninety-eight percent of the affected commercial interests.[127]

The Court upheld the Maryland regulation as a nondiscriminatory measure because the regulation did not discriminate on its face against interstate goods, nor did it favor local producers and refiners.[128] The Court drew a distinction between discrimination against interstate firms and interstate commerce:

> While the refiners will no longer enjoy their same status in the Maryland market, in-state independent dealers will have no competitive advantage over out-of-state dealers. The fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce.[129]

This reasoning is questionable in light of the *Hunt* analysis because the Court defined the scope of its inquiry as the narrow market of independent dealers instead of examining the discriminatory effects of the regulation.[130] Finding no advantage to in-state independent dealers in relation to out-of-state independent dealers,[131] the Court concluded its inquiry into discriminatory effects. This limited inquiry into discriminatory effects is not sensible because independent dealers in Maryland compete not only against out-of-state

125. *Id.* at 119.

126. *Id.* at 138 (citation omitted).

127. *Id.* (citation omitted).

128. *See id.* at 125.

129. *Exxon Corp.*, 437 U.S. at 126 (footnote omitted). The Court also said that there cannot be discrimination against interstate commerce because all of the gasoline sold in Maryland is refined elsewhere, and the same amount will enter the state under this law that entered it previously. *See id.* at 125. Yet, the decision clearly eliminated in-state affiliates of producers and refiners as competitors to in-state independent dealers. Out-of-state independent dealers continued to face competition from out-of-state affiliates of producers and refiners. Arguably, the regulation thus sheltered in-state independent dealers, to the extent that in-state independent dealers faced less competition in the marketplace than their out-of-state independent dealer counterparts. While the Court focused on the supply of gasoline entering Maryland, the regulation's impact is best measured by a competitive advantage which attaches to intrastate commerce. This market boost to in-state independent dealers constitutes implicit discrimination against interstate commerce.

130. *See id.* at 126.

131. *Id.*

independent dealers but also against in-state affiliates of producers and refiners as well. Thus, *Exxon* when read with *Clover Leaf Creamery Co.* suggests a limited review for discriminatory effects produced by a regulation, a position that is inconsistent with the Court's analysis in *Hunt*.

c. Maine v. Taylor: *Safety Benefits as Justification for Discrimination*

In addition to providing an inconsistent level of review for discrimination, the Court, when using the discrimination approach, has not been clear about the showing of benefits needed to justify a discriminatory regulation. This Subsection compares *Hunt* with *Taylor* to demonstrate that the Court's review of safety benefits to justify a discriminatory regulation has been inconsistent as well.

As discussed earlier, the Court found few safety benefits produced by the North Carolina regulation in *Hunt*.[132] Rather than accepting the interest of "protecting their citizens from confusion and deception in the marketing of foodstuffs"[133] with minimum scrutiny, the Court questioned whether permitting "the marketing of closed containers of apples under *no* grades . . . [would] eliminate the problems of deception and confusion created by the multiplicity of differing state grades; indeed, it magnifies them by depriving purchasers of all information concerning the quality of the contents of closed apple containers."[134] Moreover, the Court questioned why the regulation directed "its primary efforts not at the consuming public at large, but at apple wholesalers and brokers who are the principal purchasers of closed containers of apples. And those individuals are presumably the most knowledgeable individuals in this area."[135] Accordingly, the Court concluded that "the statute does nothing at all to purify the flow of information at the retail level, it does little to protect consumers against the problems it was designed to eliminate."[136]

While this close reading of a state's asserted safety interest is sensible, the Court has not consistently applied this level of review to safety benefits alleged by a state. As a result, it is unclear what level of safety benefits is sufficient to justify a discriminatory regulation. *Maine v. Taylor*[137] demonstrates how the Court has departed from the level of review in *Hunt* of the alleged safety benefits flowing from a regulation.

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132. *See supra* note 112 and accompanying text.
133. Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 353 (1977).
134. *Id.* (emphasis in original).
135. *Id.*
136. *Id.*
137. 477 U.S. 131 (1986).

In *Taylor*, Maine had enacted a regulation prohibiting the importation of live baitfish into the state.[138] Robert Taylor, a Maine resident engaged in the business of raising golden shiners for commercial sale,[139] "arranged to have 158,000 live golden shiners delivered to him from outside the State."[140] The U.S. government indicted Taylor for violating a federal law incorporating the Maine regulation,[141] but Taylor moved to dismiss the indictment on the ground that Maine's import ban violated the Commerce Clause.[142] The federal trial court held for the government after concluding that "the state clearly has a legitimate and substantial purpose in prohibiting the importation of live bait fish."[143] In making its determination, the trial court relied on arguments that the regulation helped control "the spread of disease among Maine's wild fish population" and prevent "the introduction of exotic species of fish into the State of Maine."[144] The trial court further concluded that the government had demonstrated the unavailability of less discriminatory alternatives to the regulation, although the court recognized disagreements among the experts on this issue.[145]

In reversing the trial court, the First Circuit disagreed on the issue of legitimacy of local purpose and whether less restrictive alternatives were available to Maine.[146] "On the issue of legitimate local purpose, the statement by the Department of Inland Fisheries and Wildlife, which

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138. *Id.* at 132.

139. United States v. Taylor, 585 F. Supp. 393, 394 n.1 (D. Me. 1984), *rev'd*, 752 F.2d 757 (1st Cir. 1985), *rev'd sub nom.* Maine v. Taylor, 477 U.S. 131 (1986). According to Taylor's testimony, "he [was] unable to harvest a sufficient number of golden shiners to meet public demand, especially during the winter ice fishing season when the demand for live bait fish exceeds the supply." *Id.*

140. *Taylor*, 477 U.S. at 132. Golden shiners are a species of bait fish. *See id.*

141. The district court recited the charges as follows:

> The defendant has been charged in a two-count indictment alleging violations of 16 U.S.C. §§ 3372 and 3373, also known as the Lacey Act Amendments of 1981, which make it a federal offense for any person "to import, export, transport, sell, receive, acquire or purchase in interstate . . . commerce (A) any fish or wildlife taken, possessed, transported, or sold in violation of any law . . . of any State. . . ."

Taylor, 585 F. Supp. at 394 (footnotes omitted) (omissions in original) (quoting 16 U.S.C. § 3372(a)(2) (1982)).

142. *Id.*

143. *Id.* at 397. The Federal Magistrate concluded that the regulation facially discriminated against interstate commerce and the trial court accepted this conclusion without further discussion. *See id.* at 395. On appeal to the First Circuit Court of Appeals, "[t]he [U.S.] government and intervenor State of Maine concede[d] that section 7613 discriminate[d] facially against interstate commerce." United States v. Taylor, 752 F.2d 757, 759 (1st Cir. 1985), *rev'd sub nom.* Maine v. Taylor, 477 U.S. 131 (1986).

144. *Taylor*, 585 F. Supp. at 395 (citation omitted).

145. *Id.* at 398.

146. *Taylor*, 752 F.2d at 761-63.

emphasizes benefits to local business accruing from section 7613, evinces an aura of economic protectionism, which is 'abhorrent to the Commerce Clause.'"[147] In speaking against a proposed repeal of the regulation, the Maine Department of Inland Fisheries and Wildlife had taken the following position:

> [W]e can't help asking why we should spend our money in Arkansas when it is far better spent at home? It is very clear that much more can be done here in Maine to provide our sportsmen with safe, home-grown bait. There is also the possibility that such an industry could develop a lucrative export market in neighboring states.[148]

The circuit court also refused to conclude that Maine had "searched for and found the least discriminatory alternative"[149] for advancing the state's purported interest "in excluding fish parasites and exotic species."[150] The circuit court based its analysis on evidence of alternatives adopted in other states[151] plus additional options that Maine could have adopted to lessen the discrimination against interstate commerce.[152]

The U.S. Supreme Court reversed the First Circuit in an opinion that departed from the level of scrutiny given North Carolina's asserted interest in *Hunt*. As discussed earlier, the Court in *Hunt* challenged the state's asserted interest in consumer protection in an analysis of real benefits flowing from the regulation. By contrast, the Court accepted questionable assertions of benefits produced by the regulation scrutinized in *Taylor*. Rather than frame the legal issue in terms of whether the challenged regulation furthered the state's interest, the Court defined the inquiry as whether "the District Court clearly erred in finding that substantial scientific uncertainty surrounds the effect that

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147. *Id.* at 761 (quoting Hughes v. Oklahoma, 441 U.S. 322, 333 (1979)).

148. *Id.* at 760.

149. *Id.* at 763.

150. *Id.* at 759.

151. In a footnote, the Court recounted several regulatory schemes adopted by other states to advance the same state interest:

> Defendant has called to the court's attention a Tennessee regulation providing for inspection of out-of-state fish . . . . *Cf.* Minn. Stat. Ann. § 101.42(6) (West 1977) (permits required for importation of minnows); S.D.Codified Laws § 41-14-30 (1977) (same); Utah Code Ann. § 23-15-12 (1976) (permission from wildlife board available for importation of aquatic wildlife); Va. Code § 28.1-183.2 (1979) (administrative permission available for importation of fish or shellfish).

Taylor, 752 F.2d at 762 n.15.

152. *See id.* at 762-63. The regulation "block[ed] all inward shipments of live baitfish at the State's border," thus restricting interstate trade in the most direct manner possible. Maine v. Taylor, 477 U.S. 131, 137 (1986). "[S]ince Maine's import ban discriminate[d] on its face against interstate trade," the Court focused on whether discrimination could be justified. *See id.* at 138.

baitfish parasites and nonnative species could have on Maine's fisheries."[153] Moreover, the Court expressly recognized "the possibility that [the imperfectly understood environmental risks] may ultimately prove to be negligible."[154]

This standard of justification differs markedly from proving that local benefits do indeed flow from a regulation. No evidence in the opinion indicated that the ban had reduced the number of parasites in Maine or prevented parasites from entering Maine.[155] To the contrary, the regulation did "not bar all traffic in bait fish; it focuse[d] only on bait fish that [came] from other states."[156] "[L]ittle could be done to prevent fish from swimming over the New Hampshire border into Maine. . . . [T]he state's policy of permitting importation of freshwater fish undermined the putative goals of the bait fish law."[157] The conflicting freshwater fish policy and the open border with neighboring New Hampshire brought into question whether the regulation furthered wild fish protection.[158] For the Court to conclude under all of the above circumstances that sufficient benefits flowed from the regulation to justify discrimination against interstate commerce meant the Court strayed from the level of review in *Hunt*.

This Subsection has demonstrated that the Court has been inconsistent in reviewing state allegations of safety benefits flowing from challenged

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153. *Taylor*, 477 U.S. at 148.

154. *Id.*

155. *Id.* at 140-144, 148. To support its argument that imported bait fish posed a serious threat to the indigenous wild fish population, Maine identified three parasites that might be found in imported bait fish: capillaria catastomi, pleistophora ovariae, and bothriocephalus opsalichthydis. *Taylor*, 585 F. Supp. at 395-96.

156. *Taylor*, 752 F.2d at 761. The First Circuit, for this and other reasons, concluded that the Maine regulation was not a quarantine statute. *Id.*

157. *Id.* at 762 n.12 (citations omitted).

158. There were additional factors as well that undermined the regulation's furtherance of wildlife protection. For example, (1) "[t]he defendant's expert testified that capillaria catastomi is not unique to golden shiners and that . . . it is debatable whether the parasite is a true pathogen," *Taylor*, 585 F. Supp. at 395 (citation omitted); (2) "it is the malnutrition, and not the [capillaria catastomi], which causes the problems of stunted growth in bait fish," *id.* at 396; (3) capillaria catastomi "would not affect wild fish to the degree it affects hatchery fish, because hatchery fish are generally more susceptible to disease, due to their close proximity during spawning," *id.* (citation omitted); (4) "[t]he defendant's expert testified that pleistophora ovariae is strictly a commercial hatchery problem and that while it was possible that it could be transmitted into the wild fish population, . . . he did not believe the organism presented any danger," *id.* (citation omitted); (5) a third parasite, bothriocephalus opsalichthydis, was not found in the defendant's shipment of bait fish, *id.* (citation omitted); and, (6) "defendant's expert noted that once the tapeworm enters a fish population, and despite a certain mortality rate among the fish, there is little impact after this initial exposure," *Taylor*, 585 F. Supp. at 396 (citation omitted).

In light of this evidence, safety benefits might not have mattered to state legislators in maintaining the regulation. *But see Taylor*, 477 U.S. at 148.

regulations. The inconsistency has detracted from a clear and consistent application of the discrimination approach. The following Subsection shows that the Court has been inconsistent in its search for available alternatives to discriminatory regulations as well.

d. Exxon Corp. v. Governor of Maryland *and* Maine v. Taylor*: The Search for Available Alternatives*

A final difficulty with the discrimination approach is the failure of the Court to engage in a sensible and consistent inquiry for nondiscriminatory alternatives to a challenged regulation. This Subsection demonstrates the difficulty of reconciling the search for an alternative in *Hunt* with the analysis in *Exxon* and *Taylor*. The same difficulty could be shown with equal force using other cases,[159] but *Exxon* and *Taylor* are the most effective in demonstrating the uncertainty in the alternatives' analyses.

In *Exxon* Maryland could have established interim procedures for gas distribution during periods of petroleum shortages. This would have allowed the independent retailers to have a steady supply of gas without banning competitors of independents. Another possibility would have been to establish over time a trust fund of emergency fuel reserves. Either the state or retail service stations could have contributed some nominal supply during periods of plenty. During times of petroleum shortages declared either by the governor or a state administrative officer, independents could have then tapped into the trust fund until the shortage ended. These suggestions are comparable to the nondiscriminatory alternatives offered in *Hunt*. Thus, the *Exxon* Court failed to apply the inquiry for nondiscriminatory alternatives in a fashion consistent with *Hunt*.[160]

Compared with *Exxon*, *Taylor* posed a stronger case for nondiscriminatory or less discriminatory alternatives to achieve a state interest.[161] The Court

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159. *See, e.g.*, Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 678 n.26 (1981) (declining to discuss whether the law was discriminatory because "the [discrimination] theory was neither briefed nor argued in this Court"); Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 43 (1980) (noting that "some intermediate form of regulation" might be as effective in protecting against the alleged evils as "outright prohibition of entry"); Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 448 (1960) (failing to discuss less discriminatory alternatives even though regulation probably discriminated in effect against interstate commerce).

160. Of course, the Court rejected the proposition that discrimination existed as a threshold matter. *Exxon*, 437 U.S. at 125. The Court could have assumed discrimination for the sake of argument and made the case that Maryland lacked other options to address gasoline shortages. Perhaps the Court ignored this line of reasoning because other alternatives were readily conceivable, thus weakening its conclusion that no discrimination existed.

161. Maine argued that "the [importation] ban legitimately protect[ed] the State's fisheries from parasites and nonnative species that might be included in shipments of live baitfish."

reviewed strong evidence of viable alternatives to Maine's importation ban on live baitfish.[162] Wisconsin required disease-free certifications for shipments of imported fish.[163] Tennessee conducted its own inspections of out-of-state fish.[164] Minnesota prohibited use of imported minnows for bait purposes except as specifically permitted.[165] Some states "require[d] administrative approval for the importation and introduction of any live fish," including Utah, Virginia, Wisconsin, and South Dakota.[166] Several other states, such as Alabama, North Carolina, and Nevada, granted authority to their fish and game agencies to prohibit species importation.[167]

As an alternative to an importation ban, the First Circuit raised the possibility of raising baitfish on bait farms set aside for that species alone.[168] Maine could have alleviated the problem of introducing exotic species into Maine waters simply by limiting imports to baitfish grown on such farms.[169] Rather than considering this alternative as less discriminatory than Maine's importation ban, the Court chose to focus on a specific issue of "whether scientifically accepted techniques exist for the sampling and inspection of live baitfish."[170] This failure to analyze fully a feasible alternative to a discriminatory regulation, particularly in the case of an importation ban, is inconsistent with the analysis and spirit in *Hunt*.

Having reviewed the Court's inquiry into whether alternatives to discriminatory regulations exist, we can see that the Court has not been consistent in the rigor of its analyses. The Court in *Hunt* quite confidently raised a series of alternatives to North Carolina's regulation that discriminated in effect against interstate commerce. In contrast, the *Exxon* Court was silent about the question of less restrictive alternatives to a regulation prohibiting producers or refiners of petroleum products from operating retail service stations within Maryland. This Subsection has shown that several conceivable approaches would have furthered the availability of petroleum for all retail stations in Maryland without discriminating in effect against interstate commerce. In further contrast, the *Taylor* Court had evidence of a number of alternatives short of an importation ban for protecting wild fish. Nonetheless,

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Taylor, 477 U.S. at 133.

162. *See id.* at 151 n.22.

163. *See* United States v.Taylor, 752 F.2d 757, 762 n.14 (1st Cir. 1985), *rev'd sub nom.* Maine v. Taylor, 477 U.S. 131 (1986) (citing WIS. STAT. ANN. § 29.535(1)(c) (West Supp. 1984)).

164. *Id.* at 762 n.15.

165. *Taylor*, 477 U.S. at 151 n.22.

166. *Id.*

167. *Id.*

168. *Taylor*, 752 F.2d at 763 n.17 (citation omitted).

169. *Id.* at 763 n.17.

170. *Taylor*, 477 U.S. at 146.

the Court chose to focus on an issue tangential to reasonable alternatives, namely, "whether scientifically accepted techniques exist for the sampling and inspection of live baitfish."[171] Taken together, these cases show that the Court has been inconsistent in its search for alternatives to challenged discriminatory regulations.

Unfortunately, the inconsistency has not been limited to the search for alternatives to discriminatory regulations. As this section on the modern caselaw has shown, the modern Court has been inconsistent in applying the balancing test. While the Court used a deferential standard of review for highway regulations in *Barnwell Bros.*, it adopted a balancing test that it applied to later highway cases such as *Raymond* and *Kassel*. Neither case has provided clear guidance on where the line should be drawn between permissible and impermissible state regulation. *Raymond* hinted that the Court would be more sympathetic to a state's safety interest under the balancing approach if more evidence were developed about safety benefits. Iowa learned from Wisconsin's failure in *Raymond* to develop a record on the safety issue. Nonetheless, the Court found Iowa's extensive evidence of safety benefits from a shorter truck length limit to be lacking.

Thus, the history of the Commerce Clause has been characterized by unclear decisionmaking. Under the Articles of Confederation, trade wars among the states produced a consensus that a central government needed the power to regulate but no clear thinking on where the line should be drawn between permissible and impermissible state regulation. The Court has experimented with various formulations, all of which have failed to define a principled framework for review of regulations. Thus, the jurisprudence suffers from wrong answers to the wrong questions posed by current doctrine.

III. THE CRITICAL LITERATURE OF THE DORMANT COMMERCE CLAUSE

This Section summarizes the critical literature generated by the dormant Commerce Clause jurisprudence. The section begins with an examination of scholarship proposing that the Court simply eliminate its role in this area altogether in the interests of convenience and judicial efficiency. Then, the section reviews the efforts of other scholars who argue that the jurisprudence can be made clear with an emphasis on discrimination. The section concludes that the critical literature has fallen short of defining where the line between permissible and impermissible state regulation should be drawn.

A. Proposals for the Elimination of a Judicial Role

Several constitutional scholars have issued a general call for the Court to

171. *Id.*

abandon the dormant Commerce Clause in its current form.[172] This Subsection shows that these proposals are unconvincing because they fail to solve the dormancy problem. These scholars assume either that other constitutional provisions, such as the Privileges and Immunities Clause, can replace the dormant Commerce Clause or that Congress and administrative agencies will step into the void created by the judiciary. Both assumptions are questionable. A better approach for reforming the dormancy doctrine would be to recognize the important role of the Court.

Proponents of eliminating the Court's role in dormant Commerce Clause cases have avoided the challenge of making an uncertain dormancy doctrine more certain in its application. Professor Eule, for example, would replace judicial review on Commerce Clause grounds by appealing to the term "citizen" in the Privileges and Immunities Clause.[173] Eule believes we no longer need a dormancy doctrine as we did in the 1940s when the Court embraced Dowling's suggestion of balancing national and local interests.[174] In proposing a model for measuring legislative discrimination against unrepresented interests, Eule bases his argument largely on the definition of citizenship rights as applied in the Privileges and Immunities Clause.[175]

Eule's proposal falls short of solving the dormancy problem on several points. First, Eule fails to address where the line should be drawn between

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172. Steven Breker-Cooper, *The Commerce Clause: The Case for Judicial Non-Intervention*, 69 OR. L. REV. 895, 896 (1990) ("I argue that the judiciary should not intervene in regulating state commercial enactments until and unless Congress acts."); Eule, *supra* note 14, at 428 ("In the pages that follow, I proffer a radically diminished role for both the dormant commerce clause and the Court as its interpreter."); Daniel A. Farber, *State Regulation and the Dormant Commerce Clause*, 3 CONST. COMMENTARY 395, 396 (1986) ("This article will argue for a sharply reduced judicial role in reviewing state regulations under the dormant commerce clause.") (footnote omitted); Richard D. Friedman, *Putting the Dormancy Doctrine Out of Its Misery*, 12 CARDOZO L. REV. 1745, 1745 (1991) ("In this essay, I argue that Justice Scalia's instincts are correct: the dormancy doctrine ought to be abandoned, though not necessarily for the reasons he suggests."). It should be noted that Farber might no longer hold this position. *See* Letter from Daniel A. Farber, Professor of Law, University of Minnesota, to Winkfield F. Twyman, Jr., Associate Professor of Law, California Western School of Law 1 (May 9, 1994) (on file with author).

173. Eule, *supra* note 14, at 428 ("Indeed, in those instances where judicial intervention appears warranted, it is only the anachronistic definition of the term 'citizen' in the privileges and immunities guarantees of Article IV, Section 2 that justifies the preservation of the commerce clause's negative side at all." (footnote omitted)).

174. *See* Eule, *supra* note 14, at 427 n.7, 428. Professor Eule argues that while Dowling's proposal that the Court balance national and local interests absent congressional legislation was innovative in 1940, the balancing test now "serves neither as an adequate explanation of the Court's recent offerings nor as a satisfactory theoretical foundation for a consistent decisional framework. More important, its *raison d'être* has evaporated." *Id.* at 427 (footnote omitted).

175. *See supra* note 173 and accompanying text. The Privileges and Immunities Clause reads: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. CONST. art. IV, § 2, cl. 1.

permissible and impermissible state regulation. By using judicial review of citizenship rights as a proxy for a measuring process,[176] Eule avoids altogether the regulation issue. Second, Eule acknowledges that the Privileges and Immunities Clause does not represent a constitutional tool equal in scope to the dormant Commerce Clause: "Most serious of its shortcomings is the antiquated doctrine of *Paul v. Virginia*, [75 U.S. (8 Wall.) 168 (1869)] which excludes corporate entities from the protective arms of the [Privileges and Immunities] [C]lause."[177] Thus, in his effort to legitimate judicial review in dormancy doctrine, Eule fails to address the limits of permissible state regulation.

Even if it could be argued that legitimization of judicial review and the limits of permissible state regulation are the same inquiry, the *Paul v. Virginia*[178] doctrine limits the reach of the privileges and immunities doctrine to noncorporations.[179] This limitation excludes the use of the doctrine from most dormancy matters because the vast majority of challenges to state regulations are brought by corporations and business interests.

Of course, the Court could change its interpretation of the Privileges and Immunities Clause and extend its protections to corporations, thus overruling *Paul*. Several commentators, including Eule, have called for the reversal of the *Paul* doctrine because it permits state discrimination contrary to the spirit of the Privileges and Immunities Clause.[180] From a practical standpoint,

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176. Eule, *supra* note 14, at 456 ("Silencing the commerce clause's dormant facet will sharpen our focus, but the task reassigned to the privileges and immunities clause will nevertheless be formidable. A representation-enforcing approach requires a court to ascertain whether the mechanisms of participatory democracy have failed to function properly.").

177. *Id.* at 449 (footnotes omitted).

178. 75 U.S. (8 Wall.) 168 (1868).

179. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 403 n.3 (2d ed. 1988) ("It should be noted in this regard, however, that the typical beneficiary of the commerce clause's negative implications is a *corporate* entity and as such cannot claim the protection of article IV's privileges and immunities clause." (citations omitted)); JETHRO K. LIEBERMAN, THE EVOLVING CONSTITUTION 409 ("The [Privileges and Immunities] [C]lause encompasses the rights of citizens, not corporations or other business entities." (endnotes omitted)).

180. Eule, *supra* note 14, at 450-51 ("This limitation of Article IV's application to natural persons would render it completely inadequate for the purposes I have suggested."); Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundation of Choice of Law*, 92 COLUM. L. REV. 249, 269-70 (1992) ("The omission of corporations from the Privileges and Immunities Clause is not an element of the constitutional scheme; it is a relic from a time before general incorporation laws."); Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569, 610-11 ("The Court's failure to extend the protection of the privileges and immunities clause to corporations presents an obvious practical problem, because of the enormous amount of commerce that is conducted by corporations."); Jonathan D. Varat, *State "Citizenship" and Interstate Equality*, 48 U. CHI. L. REV. 487, 499 n.47 (1981) ("[T]he underlying antidiscrimination objectives of the clause can be thwarted as much by state discrimination against businesses

however, the Court has shown no inclination to revisit the *Paul* doctrine.[181]

Friedman goes well beyond Eule's model by eliminating the dormant doctrine altogether without expanding the Privileges and Immunities Clause to replace the present structure.[182] Instead, administrative agencies would fill the void left by the Court's abandonment of the dormancy doctrine.[183] In Friedman's view, the Court and administrative agencies are interchangeable when the need exists to invalidate impermissible state regulations.[184]

Friedman's call for the Court to jettison more than 150 years of judicial experience and knowledge rejects the advantages of doctrinal evolution such as stability in the law.[185] Moreover, administrative agencies lack the judicial power of the Court.[186] *Marbury v. Madison*[187] clearly vests the power of

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incorporated in other states as by state discrimination against natural persons who make their homes in other states.").

181. *See, e.g.*, Zobel v. Williams, 457 U.S. 55, 74 n.3 (1982) (O'Connor, J., concurring) ("It is settled that the Privileges and Immunities Clause does not protect corporations." (citing Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1868))).

182. Friedman states:

> I thus go further than does Professor Eule, who argues that the dormancy doctrine [sic] should be eliminated except to the extent necessary to take up what he perceives as the slack left by an unduly narrow view of the term "citizens" in the privileges and immunities clause of article IV, section 2 of the Constitution. . . . By contrast, I would eliminate the dormancy doctrine altogether, without expanding the scope of the privileges and immunities clause beyond a narrow prohibition—the bounds of which I will not attempt to define here—of certain types of discrimination against individuals.

Friedman, *supra* note 172, at 1746 n.4 (citing Eule, *supra* note 14, at 428).

183. Friedman explains:

> To prevent any confusion, I will assert right off that I recognize as essential to our national economy that there be some federal authority ready and able to invalidate state laws that unacceptably interfere with interstate commerce. . . . My argument is simply that this authority should not be judicial. I do not question *whether* the authority should exist; I only question *who* should exercise it. Congress itself can perform only a small part of the job. Most of the burden, therefore, must be borne by one or more administrative agencies.

Id. at 1746 (emphasis in original).

184. *See id.* Friedman hints that administrative agencies might do a better job than the Court "because the agency would not confront the factors that appropriately inhibit the courts from unduly interfering with political decisions." *Id.*

185. By way of contrast, Professor Regan's proposal that the Court should be concerned only with preventing protectionism in dormant Commerce Clause cases expressly draws upon what the Court has been doing in this area. *See* Regan, *supra* note 8, at 1206 ("But my claim, remember, is that in the dormant commerce clause area, and most particularly in movement-of-goods cases, the Court has been doing just what it should do.").

186. *See* LIEBERMAN, *supra* note 179, at 280. While federal administrative agencies may hear important types of cases, Article III as interpreted by the Court vests the power to declare a law unconstitutional and the power to review and overturn administrative action in the Court. *Id.* Congress may choose to invest administrative agencies with sweeping enforcement powers, thus

judicial review in the Court.[188] From a judicial standpoint, even the most aggressive agency can merely hold hearings and assess the penalties expressly allowed by the statute enacted by Congress authorizing the regulation.[189] If adopted, Friedman's proposal would displace the check of judicial review on state regulation with administrative agency oversight. Friedman fails to consider whether the imposition of an agency buffer zone between state lawmaking and judicial review would enhance or deter undue interference with interstate commerce.[190]

Besides the consequences for state behavior, Friedman's model would create new incentives for special interest groups to lobby congressional committees for favors. If trade association *X* challenges a state regulation and loses before the administrative agency, the association's strategy might be to curry favor with members of the respective oversight committees in the United States Senate and House of Representatives. The trade association could argue either that the law needs to be changed "to prevent this injustice" or that counterbalancing language must be inserted into the committee report from relevant congressional committees to show "true congressional intent." Alternatively, the association could request that the key staff of congressional members convene a meeting to question agency heads about general agency operations. It is not uncommon for regulated interest groups to pursue a

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promoting compliance with the Commerce Clause as a practical matter. *Id.* However, the ultimate power of review rests in the Court and, in theory, all administrative decisions must conform with statutory and judicially developed limitations on administrative power. *Id.*

187. *See* 5 U.S. (1 Cranch) 137 (1803) (Marshall, C.J.).

188. Chief Justice John Marshall stated in his opinion:

> It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.
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> . . . .
>
> If, then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply.

Id. at 177-78.

189. LIEBERMAN, *supra* note 179, at 34 ("Congress may provide that violation of a regulation be punished exactly as if it were an enactment of Congress . . . . But the penalties must be stated in the congressional statute authorizing the regulation; the administrative agency may not invent a new punishment or enlarge one set out in the law." (endnotes omitted)). For an interesting observation about the power that "independent" administrative agencies wield, see *id.* at 34-35.

190. Scholars have split over the issue of whether administrative agencies are preferable to courts in implementing the law. *Compare* Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model,* 86 COLUM. L. REV. 223, 264 (1986) ("Agency officials, who lack lifetime appointments, are subject to political pressures from which judges are immune.") *with* Richard Pierce, *Institutional Aspects of Tort Reform,* 73 CAL. L. REV. 917, 936 (1985) (stating that "agencies are more legitimate than courts as a source of law reform" in the context of tort reform).

lobbying strategy directed at the membership and staff officials of key oversight committees.[191]

However, Friedman assumes congressional consideration of state regulation would produce a better result than judicial review. I think this assumption is suspect because of the need for litigants to have certainty in the law. As opposed to political appeals to Congress, judicial review under the dormant Commerce Clause assures litigants of a focused inquiry: Does discrimination against interstate commerce exist? Do the benefits to the state from a regulation outweigh the burden on interstate commerce? Although imperfect, the focused dormancy doctrine compares favorably with the political results of a potential iron triangle, "a situation in which the agency, a powerful constituency with a vested interest in the status quo at the agency, and a few well-placed legislators beholden to that constituency act together to block all attempts at change."[192]

The role of the Court as preserver of the national interest in interstate commerce forms a cornerstone of our post-New Deal Constitution.[193] When

191. Along these lines, several commentators have developed capture and iron triangle theories to explain the symbiotic relationship between regulated industries and regulating administrative agencies. *See, e.g.*, Alfred C. Aman, Jr., *Administrative Law in a Global Era: Progress, Deregulatory Change, and the Rise of the Administrative Presidency*, 73 CORNELL L. REV. 1101, 1130 n.143 (1988) (defining capture as "a neutralization of effective agency regulatory authority and an undermining of agency innovative ability"); Macey, *supra* note 190, at 263 (stating that the capture theory is "a primitive version of the economic theory of regulation which predicts 'that over time regulatory agencies come to be dominated by the industries regulated.'" (quoting Richard A. Posner, *Economics, Politics, and the Sending of Statutes and the Constitution*, 49 U. CHI. L. REV. 263, 341 (1982))); Pierce, *supra* note 190, at 935 n.104 ("'Capture' refers to the tendency of some agencies to favor the industry they are required to regulate by protecting the industry from outside competition and stifling innovation that threatens the status quo in the industry." (citation omitted)); Pierce, *supra* note 190, at 935 n.105 ("The 'iron triangle' refers to the combination of direct beneficiaries of a regulatory program, bureaucrats who run the program, and legislators with oversight responsibility for the program. This combination often develops a shared interest in maintaining the status quo of a program's function." (citation omitted)). It should be noted that the capture theory and other public choice models have had difficulty in explaining the rise of consumer and environmental protection regulation. *See generally* Christopher H. Schroeder, *Rights Against Risks*, 86 COLUM. L. REV. 495 (1986).

192. Pierce, *supra* note 190, at 934 (footnote omitted).

193. *See, e.g.*, Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 669 (1981) ("When a State ventures excessively into the regulation of these aspects of commerce, it 'trespasses upon national interests, and the courts will hold the state regulation invalid under the [Commerce] Clause alone." (citation omitted) (quoting Great Atl. & Pac. Tea Co. v. Cottrell, 424 U.S. 366, 373 (1976)); Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 454 (1979) ("But it long has been 'accepted constitutional doctrine that the commerce clause . . . affords some protection from state legislation inimical to the national commerce, and that in such cases, where Congress has not acted, this Court, and not the state legislature, is under the commerce clause the final

Congress has failed to regulate commerce among the several states, the Court has applied various structures to guard against undue interference with interstate commerce.[194] If Friedman's model is adopted, administrative agencies simply could not muster the credibility and respect of the Court in safeguarding the national interest.[195]

Professor Breker-Cooper also argues that the Court should not hear commercial cases because of congressional power to preempt state law and Court decisions in this area.[196] He believes that unless Congress acts, the states should be free to regulate commerce in any way they choose.[197] Breker-Cooper concludes that the Court, not the states, are precluded from action in this area.[198] While "[c]urrent dormant commerce clause jurisprudence is extremely unsatisfactory"[199] and abandonment of the doctrine might increase democratic accountability, Breker-Cooper shares with Friedman an unwarranted faith in political responses from Congress. That Congress has "the political will to act when necessary"[200] does not find support in the congressional response to the federal budget deficit, the savings and loan scandal, or the health care crisis. Because Congress lacks the political will to regulate commerce, the Court has developed a series of judicially imposed limitations on state regulations to ward off undue interference with interstate commerce.

The best examples of political will are those limited instances in which Congress has overruled Supreme Court decisions.[201] But these decisions

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arbiter . . . .'" (quoting Southern Pac. Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761, 769 (1945)); Howard O. Hunter, *Federalism and State Taxation of Multistate Enterprises*, 32 EMORY L.J. 89, 99 (1983) ("Unless Congress does more, courts will have to rely on the restraining power of the dormant Commerce Clause to determine the permissible extent of state taxation. A federal court must decide whether a particular state tax effectively undermines the national economic unit."); Redish & Nugent, *supra* note 180, at 581 n.76 ("'[I]n general Congress has left it to the courts to formulate the rules thus interpreting the commerce clause in its application, doubtless because it has appreciated the destructive consequences to the commerce of the nation if their protection were withdrawn . . . .'") (quoting *Southern Pac.*, 325 U.S. at 770) (alteration in original) (omission in original); John R. Sagan, Note, *Severance Taxes and the Commerce Clause:* Commonwealth Edison v. Montana, 1983 WIS. L. REV. 427, 436 (1983).

194. *See* discussion *supra* parts II.B.1, II.B.2.

195. *But see* Farber, *supra* note 172, at 407 ("Like the court, the agency speaks for the national interest as against parochial local interests.").

196. *See* Breker-Cooper, *supra* note 171, at 896.

197. *See id.*

198. *See id.* at 949.

199. *Id.*

200. *Id.*

201. Breker-Cooper has compiled a tally of several Supreme Court decisions overruled by Congress. After Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. (13 How.) 518 (1852), "Congress for the first time changed the outcome of a Court decision which was based on the dormant commerce clause." Breker-Cooper, *supra* note 172, at 931. Congress also

represent atypical overrulings of court decisions and thus represent fundamental congressional inertia. Congress can respond in one of three ways to interstate commerce: (1) it can regulate interstate commerce, in which case there is no dormant Commerce Clause issue; (2) it can do nothing, in which case there is the classic dormant Commerce Clause dilemma; or (3) it can overrule a Court ruling due to the prevailing political will. As a general rule, congressional inaction means the political will did not exist to regulate commerce before or after a Court ruling. How removing the Court from the dynamic altogether might generate political will when Congress has failed to regulate commerce in the past cannot be answered with a faith that Congress will find the political will to act when necessary. Once a judicial check has been removed, more states will thus have an incentive to interfere with interstate commerce.[202]

Does this reasoning suggest that the Court is nothing more than a proxy for congressional regulation?[203] Breker-Cooper shares the widely held notion "that the Court is using the dormant commerce clause to effectuate the unexpressed intention of Congress."[204] If we assume the various structures of review communicate the unarticulated intention of Congress, then a proxy argument makes sense. Congress, however, has neither decided that all state regulations are permissible unless they impermissibly burden interstate commerce nor that all state regulations are permissible unless they discriminate against interstate commerce with certain limited exceptions.[205] Thus, the judicially developed limitations cannot be squared with congressional intent.

Breker-Cooper also does not fully explain why his proposal "would lead to increased certainty for state legislatures."[206] One can imagine a torrent of "independent" discriminatory regulations[207] forcing states to maintain constant vigilance against protectionist attacks by neighboring states. Under

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overruled the Court after Leisy v. Hardin, 135 U.S. 100 (1890); Bowman v. Chicago & Northwestern Railway, 125 U.S. 465 (1888); and United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944). Breker-Cooper, *supra* note 172, at 931-34.

202. Of course, the risk of state interference could force Congress to speak but this hope requires a faith in political will as well.

203. Eule makes this argument as historical justification for the dormant Commerce Clause, although he believes that Congress can now fend for itself and that the dormant Commerce Clause should be discarded. *See* Eule, *supra* note 14, at 431-32, 435.

204. Breker-Cooper, *supra* note 172, at 906.

205. Congress, of course, has the power to allow state interference with interstate commerce. *See, e.g., id.* at 934 ("The McCarran-Ferguson Act was held to allow South Carolina to impose a tax on out-of-state insurance companies that arguably would have violated the commerce clause, because the tax discriminated in favor of in-state companies.") (footnote omitted).

206. Breker-Cooper, *supra* note 172, at 919.

207. Professor Collins uses this term to describe state laws that discriminate against interstate commerce irrespective of other state laws. *See* Richard B. Collins, *Justice Scalia and the Elusive Idea of Discrimination Against Interstate Commerce,* 20 N.M. L. REV. 555, 556 (1990).

the Breker-Cooper model, states would have no recourse to the judicial branch for an analysis of whether interstate commerce had been unduly disrupted. A state's only recourse would be to the highly politicized arena of Congress, and its chances of success would depend upon whether the state's congressional delegation wielded influence. This scenario produces less certainty, not more.

In general, abandonment scholarship fails to provide structure to guide a state's lawmakers. Scholars assume the absence of the dormant Commerce Clause would mean more order than continued reliance on it. However, the absence of a well-developed structure to replace the dormancy structure would undermine any enhanced order. Farber's proposal that the dormancy law be considered inoperative because of the preemption powers Congress can assign to administrative agencies illustrates the point.[208] Assume Congress has delegated preemption power to judge state laws to administrative agencies, thus displacing the Court as the decisionmaker. Farber argues that such an agency (which I will label the Dormant Commerce Commission (DCC)) would be a superior decisionmaker for reviewing state regulations because of its expertise.[209] Farber gives no working definition for "expertise" in this context. Although the reader may assume expertise means superior knowledge about railroads, interstate trucking, and the like, a more important expertise is institutional memory. For more than 150 years, the Court has grappled with various structures for reviewing state regulations. While the jurisprudence has not been ordered, it has worked in the sense that Congress seldom has intervened to overrule dormant Commerce Clause decisions.[210] Clearly, the Court has developed a sense of what results Congress will tolerate and what results will prompt the rare political will for Congress to take some action. Defining expertise in this fashion, the Court brings more knowledge and experience to the review of regulations.

Farber also argues that an administrative agency has a superior ability to gather information because the agency can finance new investigations to increase its knowledge.[211] While appealing in theory, the DCC would serve watchful political masters on the U.S. Senate and House Appropriations Committees.[212] These committees would control the purse strings for our

208. *See* Farber, *supra* note 172, at 396. Farber also explains that some propose "that courts invalidate only laws that intentionally discriminate against interstate commerce." *Id.* For the sake of clarity, I discuss the discrimination element to Farber's proposal in section III.B.

209. *Id.* at 407.

210. *See supra* note 202 and accompanying text.

211. Farber, *supra* note 172 at 407.

212. *See* HEDRICK SMITH, THE POWER GAME: HOW WASHINGTON WORKS 167 (1988). For example, after the head of the Congressional Budget Office (CBO) declared that the administration had understated the Pentagon's actual spending by $14.7 billion, Senator Ted Stevens of Alaska, "the hawkish chairman of the Defense Appropriations Subcommittee," raged at the CBO head with threats to cut their budget if CBO did not change their estimates on the Pentagon:

hypothetical DCC. Accordingly, commercial interests unhappy with DCC decisions could always lobby committee members and their staffs during debates over DCC appropriations. Real political limits exist on the ability of agencies to finance investigations of a controversial nature, constraints that courts do not face.[213]

Abandonment will not solve the dormancy problem. Scholars assume that other constitutional provisions like the Privileges and Immunities Clause can take up the slack or that Congress or administrative agencies will step into the void. Both assumptions are questionable. A better approach recognizes the important role of the Court.

B. Proposals for a Modified Discrimination Analysis

As discussed earlier,[214] the modern Court has developed an alternative approach to the balancing test: determining whether a regulation discriminates against interstate commerce.[215] Once the Court identifies discrimination against interstate commerce, the burden falls on the state to justify the discrimination.[216] The state must justify such discrimination in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake.[217] The burden of justification for the state is high because the state cannot rely upon mere professions of a legitimate objective.[218]

Discrimination parallels the disruptive environment that flourished under the Articles of Confederation.[219] States erected trade barriers against one another at will without fear of federal intervention.[220] Assuming that

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"That really rocks this defense bill . . . I am going to cut your money. You cannot put me in this position." *Id.* at 291 (endnote omitted). It should be noted that the Congressional Budget Office stood its ground, however. *Id.*

213. *But see* STONE, ET AL., CONSTITUTIONAL LAW (2d ed. 1991) (the Court is subject to *external* political control including constitutional amendment, the power to appoint and impeachment).

214. *See supra* notes 99-102 and accompanying text.

215. *See supra* note 99.

216. *See* cases cited *supra* note 99.

217. *See* cases cited *supra* note 100.

218. *See* cases cited *supra* note 101. The state must satisfy two criteria: that local benefits flow from the statute and that no nondiscriminatory alternatives are adequate for preserving the local interests at stake. *See supra* note 100 and accompanying text.

219. *See supra* notes 15-21 and accompanying text.

220. *See supra* notes 15-21 and accompanying text; *see also* Regan, *supra* note 8, at 1114 ("The people who wrote our actual Constitution in 1787 were well aware of this danger. They saw states enacting protectionist restrictions; they saw other states retaliating; and they feared not merely for the economic health, but also and even more for the political viability of the infant United States."); *see also* Robert N. Clinton, *A Brief History of the Adoption of the United States*

discrimination is what the dormant Commerce Clause inquiry should be about, the more difficult issues are deciding upon the appropriate manner and objective of doctrinal reform.

In an exhaustive examination of purposeful protectionism, Professor Regan argues that the Court "should be concerned only with preventing purposeful protectionism."[221] A state regulation should be unconstitutional if the law flows from a protectionist purpose "to advantage local actors at the expense of their foreign *competitors*."[222]

In defining a regulation as protectionist, Regan adopts the following two-part framework: examine whether (a) a given regulation is adopted for the purpose of improving the competitive position of local (in-state) economic actors just because they are local and (b) the regulation is analogous in form to the traditional instruments of protectionism—the tariff, the quota, or the outright embargo.[223]

While Regan's model sets up a splendid approach for reforming the discrimination rule, purposeful protectionism fails to remedy the discriminatory effect problem. Linked to the historical roots of the dormant Commerce Clause, antiprotectionism can inform review of regulations by the Court. But Regan's antiprotectionism is a preliminary sketch of an effective reform. Regan wrongly assumes the Court has been concerned exclusively with preventing states from engaging in purposeful economic protectionism. In

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Constitution, 75 IOWA L. REV. 891, 894 (1990) ("In reality foreign governments . . . declined to enter into commercial treaties with the United States because of the inability of Congress to control the commercial policies of the several states. Thus, Britain . . . closed the lucrative West Indies to American trade and discriminated against American vessels in Britain ports."); Max Farrand, *The Federal Constitution and the Defects of the Confederation*, 2 American Political Science Review, 532, 535 (1908) (noting that members of the federal convention identified state trespass upon the rights of other states as a defect of the Confederation and suggested "the central government should be given the right and power of coercion, with a negative, or some check upon State legislation.").

221. Regan, *supra* note 8, at 1093. Regan's definition of purposeful protectionism is somewhat imprecise. In his article, Regan argues "that a state statute . . . is protectionist if and only if:

(a) the statute . . . was adopted for the purpose of improving the competitive position of local (in-state) economic actors, just because they are local, vis-à-vis their foreign (by which I mean simply out-of-state) competitors . . . ." *Id.* at 1094-95. Regan later observes that "[t]here is no useful distinction to be made between motive and purpose in the present context." *Id.* at 1143. It is not clear whether Regan understands the "purpose" in purposeful protectionism to mean legislation motivated by a protectionist purpose, legislation whose "object is to improve the competitive position of local economic actors, just because they are local," *id.* at 1126, legislation having "the unvarnished intention of taking something away from other states just to enjoy it at home," *id.* at 1126 (footnote omitted), legislation with a protectionist aim, *id.* at 1130-31, 1147, or legislation enacted for protectionist reasons, *id.* at 1148.

222. *Id.* at 1095 (emphasis in original).

223. *Id.* at 1094-95.

fact, the Court has been concerned with discrimination in effect as well.[224] The Court recognizes that failure to account for discrimination in effect gives inadequate protection against undue interference with interstate commerce.[225]

Regan also draws a false line between "movement-of-goods" and other state regulation cases. Similar to the discredited direct-indirect effects test,[226] this labeling maneuver finds little support in the text of the Constitution. The Constitution addresses regulation of commerce among the several states, not the regulation of "movement-of-goods" among the several states.[227] Lacking textual and historical support, the "movement of goods" label oversimplifies the difficult inquiry whether a regulation should be permissible under the dormant Commerce Clause.[228]

Even if we assume that the dormant Commerce Clause addresses "movement-of-goods" cases, Regan's proposal fails to confront the dilemma of discrimination in effect. Discrimination in effect can be just as disruptive

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224. *See, e.g.*, City of Philadelphia v. New Jersey, 437 U.S. 617, 627 (1978); Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 350-52 (1977); Dean Milk Co. v. City of Madison, 340 U.S. 349, 354 (1951).

225. *See supra* notes 107-10 and accompanying text.

226. For roughly thirty years around the turn of this century, the Court would ask whether a regulation imposed "direct" or "indirect" effects on interstate commerce, the former being held invalid and the latter valid. Dowling, *supra* note 1, at 6. The Court began to rely upon these labels because the *Cooley* terminology ("national" and "local") left unanswered many questions about the distinction between permissible and impermissible state regulation. *Id.*

Unfortunately for the Court, the short-lived reliance on direct and indirect effects did not succeed in defining a line between permissible and impermissible state regulation. The test offered little guidance for deciding how a case should be labeled. *Id.* Quarantine laws surely would be defined as direct, yet the Court upheld quarantines. *Id.* The only certain consequence of direct and indirect effects test became uncertain application.

227. *See* U.S. CONST. art. I, § 8, cl. 3 (providing that Congress shall have the power "to regulate Commerce with foreign nations, and among the several states, and with the Indian tribes"). Rather than define commerce in a narrow sense, Chief Justice Marshall understood the "buying and selling" of goods as constituting a mere subset of a broader "commercial intercourse":

> It has, we believe, been universally admitted, that [the commerce power] comprehend[s] every species of commercial intercourse between the United States and foreign nations. No sort of trade can be carried on between this country and any other, to which this power does not extend. . . . If this be the admitted meaning of the word, in its application to foreign nations, it must carry the same meaning throughout the sentence [as applied to commerce among the several states].

Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 193-94 (1824).

228. Regan's focus on "movement-of-goods" cases is also problematic because transportation cases do a better job of illustrating the uncertainty of dormancy doctrine. If we assume reform is needed because of doctrinal disorder, transportation cases are more revealing than movement-of-goods cases. *See supra* notes 65-102 and accompanying text. While Regan believes the Court should treat transportation and movement-of-goods cases differently, *see* Regan, *supra* note 8, at 1182-92, this article provides a single doctrinal framework for state regulation of all commercial activity.

to interstate commerce and more difficult to prevent. Whether addressed in *Bibb v. Navajo Freight Lines, Inc.*[229] or *Huron Portland Cement Co. v. City of Detroit*,[230] discrimination is a concern in reviewing regulations. Regan's model fails to recognize the real challenges posed by regulatory interference with interstate commerce when the regulation lacks purposeful protectionism. His model values the label of purposeful discrimination while glossing over the real effects of interference with interstate commerce.[231]

Professor Tushnet has developed a competing discrimination model based on political process.[232] The inquiry begins with an examination of the adequacy of the legislative process.[233] In other words, has the legislative process been distorted to the disadvantage of excluded interests affected by a regulation?[234] In the case of a distorted process, Tushnet argues that judicial intervention should take the form of substantive due process in economic cases.[235] Every legislature should consider efficiency when drafting economic regulations and, in Tushnet's judgment, substantive due process is the best response to that objective.[236]

While I am sympathetic to Tushnet's focus on discrimination in economic cases, he does not expand upon whether his model is equally suited for review of state police regulations, particularly safety regulations. The Court has accorded safety regulations a traditional deference, a deference not evident in economic cases.[237]

Even if we assume that safety cases can be reviewed like economic cases under Tushnet's analysis, why should distortion of the political process be central to the inquiry? Out-of-state commercial interests that employ political action committees and government relations staffs often have far more

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229. 359 U.S. 520 (1959).

230. 362 U.S. 440 (1960).

231. *See Rethinking, supra* note 14, at 133 ("Few statutes 'artlessly disclose . . . an avowed purpose to discriminate against interstate goods,' though some do, and dormant commerce clause doctrine would have little impact were it confined to a ban on avowedly purposeful discrimination."). For an interesting discussion about the consequences of a discriminatory intent standard in the context of equal protection doctrine, see Farber, *supra* note 172, at 403-05.

232. While Tushnet does not subscribe to a process-based theory of judicial review, his discussion provides a coherent way of understanding the dormant Commerce Clause from the standpoint of excluded political interests. *See, e.g.*, Tushnet, *supra* note 40; Mark Tushnet, *Community and Fairness in Democratic Theory*, 15 FLA. ST. U. L. REV. 417, 418-20 (1987).

233. *Rethinking, supra* note 14, at 125.

234. *Id.*

235. *Id.*

236. *Id.*

237. For general support of this proposition, see Kassel v. Consol. Freightways Corp., 450 U.S. 662 (1981); Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429 (1978). *But see, e.g.*, Bibb v. Navajo Freight Lines, 359 U.S. 520 (1959); Southern Pac. Co. v. Arizona, 325 U.S. 761 (1945).

influence on the legislative process than constituents. Perhaps judicial intervention might be warranted for other reasons. However, the sustaining reason for judicial review should not flow from the premise that "local legislatures are unlikely to take into account the effects of their laws on out-of-state interests."[238]

Unless the measure regulates "hot-button" topics like abortion or hate-speech, local individual constituents will be silent in the halls of the legislature when commercial regulation comes up for committee and floor votes. Far more visible will be representatives and lobbyists for monied interests, whether those interests be in-state or out-of-state.[239] The focus on defects in the political process provides a false basis on which to justify review of state regulation. The Commerce Clause involves "commerce," not "process."

Furthermore, even if we accept the process-based justification for judicial intervention, Tushnet's notion of substantive due process has proven inadequate and unsatisfactory for constitutional adjudication in the past.[240]

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238. *Rethinking, supra* note 14, at 150.

239. For commentary on the visibility of monied interests in state government, *see generally Special Interests Give Almost $1M to Election Campaigns*, GNS, August 9, 1993, *available in* LEXIS, Nexis Library, GNS File; Scott Greenberger, *The Sleaze in the Statehouses: Inadequate State Campaign Finance Lane*, WASH. MONTHLY, April 1993, at 39. ("Illinois Bell, which stood to make hundreds of millions of dollars if a 1992 bill lifting the cap off what local telephone companies could charge customers passed, spent at least $1.9 million in campaign contributions and lobbying costs."); Donald P. Baker & Thomas Heath, *Va. Lawmakers Concede Money May Buy Access, not Influence*, THE WASH. POST, March 5, 1990, at E1. Republican Delegate Clinton Miller said of the advantage of monied interests:

> 'When push comes to shove, you are more inclined to go with' those who have given you money. . . . 'If you have six hours' to listen to someone 'and the League of Women Voters or the ACLU [who don't make campaign contributions] want four hours of your time, and so do the service station dealers [who gave him money], who do you think will get four hours?'

Id. For a general description of how the constituency process is slanted in favor of wealthy interests at the federal level, see PHILIP M. STERN, THE BEST CONGRESS MONEY CAN BUY (1988) and SMITH, *supra* note 212, at 20-41, 215-70.

240. Tushnet's use of substantive due process is limited to the review of economic regulations. Obviously, substantive due process in the context of privacy and the Bill of Rights has received widespread acceptance and forms a foundation of modern constitutional law. *See* LIEBERMAN, *supra* note 179, at 517 (observing that Justice Douglas, a sworn enemy of economic substantive due process, revived substantive due process in the context of privacy with the *Griswold v. Connecticut* decision which announced a fundamental right to privacy); RONALD D. ROTUNDA, MODERN CONSTITUTIONAL LAW, 361 (4th ed., 1993) (stating that "[The Court has] used the [Due Process] [C]lause to incorporate some, but not all, also of the substantive limitations of the Bill of Rights, and to apply those limitations to the state by virtue of the due process clause of the Fourteenth Amendment."); TRIBE, *supra* note 179, § 11-3, at 777. Tribe notes that [b]y 1973, however,

> Justice Stewart had 'accepted' Griswold 'as one in a long line of . . . cases decided under the doctrine of substantive due process,' and indeed all nine of the Justices as of 1973 had accepted the Court's role in giving the fourteenth amendment due process

Classic hornbook law defines economic substantive due process as a test of the reasonableness of a statute in relation to the government's power to enact such legislation.[241] Under substantive due process, the Court reviewed the legitimacy of governmental acts without clear guidelines in the text of the Constitution, thus either raising the *Lochner*[242] era problem of the Justices acting like a "super legislature"[243] or the post-*Lochner* era problem of "anything goes."[244]

From 1890 to 1937, the Justices employed substantive due process to invalidate any social welfare or economic legislation with which a majority of the Court disagreed.[245] This approach eventually broke down because the Justices could not articulate objective criteria for their decisions.[246] Tushnet fails to explain why the modern Court would be more successful in wielding the sword of substantive due process to review economic regulations.[247]

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clause substantive content beyond the Bill of Rights, despite significant disagreements over exactly how the role should be performed.

TRIBE, *supra* note 179, § 11-3, at 777.

241. ROTUNDA, *supra* note 240, at 346 (quoting Lochner v. New York, 198 U.S. 45 (1905)).

By the end of the New Deal, the Court had abandoned a strict review of regulations for reasonableness and reached a modern conclusion that "anything goes." *See Rethinking*, *supra* note 14, at 148 ("[I]n the substantive due process area, standards of reasonableness are so loose that the test of reasonableness is satisfied by almost any law."); TRIBE, *supra* note 179, § 8-3 at 568 (noting that "[i]n reviewing state and federal economic regulation, the Supreme Court closely scrutinized both the ends sought and the means employed in challenged legislation. In its analysis of legislative means, the Court required a 'real and substantial' relationship between a statute and its objectives").

242. Lochner v. New York, 198 U.S. 45 (1905).

243. Dennis J. Coyle, *Takings Jurisprudence and the Political Cultures of American Politics*, 42 CATH. U. L. REV. 817, 825 n.53 (1993) ("Wrote Justice Douglas [in Griswold]: 'some arguments suggest that Lochner v. New York should be our guide. But we decline that invitation . . . . We do not sit as a super-legislature. . . .' [citations omitted]."); Francis S. Chlapowski, Note, *The Constitutional Protection of Informational Privacy*, 71 B.U. L. REV. 133, 138 (1991) ("[T]he Court cannot sit as a super-legislature and in effect regulate, by striking down the laws of the elected legislature based on some arbitrary conception of 'liberty.'").

244. *See Rethinking, supra* note 14, at 148.

245. *See generally* ROTUNDA, *supra* note 240, at 355-59. In his dissent in *Lochner*, Justice Holmes reasoned that the Founding Fathers created a Constitution "for people of fundamentally differing views," and the Court should not void a law simply because a legislature enacted the measure to implement an economic policy the Justices do not believe. ROTUNDA, *supra* note 240, at 363.

246. *See generally* TRIBE, *supra* note 179, § 8-6 at 578-81.

247. Tushnet acknowledges "that open adherence to substantive due process review in economic cases is [not] free of risk." *Rethinking, supra* note 14, at 149. But he attempts to balance the risk with the benefit of added clarity: "A unified doctrine of enhanced due process would make it clear that the states can experiment, but not too much. And clarity is a virtue that cannot be valued too much in constitutional law." *Id.* at 150. Ultimately, Tushnet is unpersuasive because he fails to draw a clear line between permissible and impermissible state experimentation under substantive due process.

Professor Collins offers an interesting twist on the discrimination debate by avoiding the intent and effects distinction and the political process concern altogether. Collins proposes that the Court recognize the difference between state laws discriminating against interstate commerce without regard to the laws of other states (independent discrimination) and those laws burdening commerce only when other states' laws are taken into account (dependent discrimination).[248] Collins urges the Court to adopt a formalist approach to all state actions in interstate commerce by asking whether independent or dependent discrimination exists.

If a state regulation discriminates independently against interstate commerce, then the Court should presume the measure invalid.[249] Collins suggests that this working definition produces a much-needed consistency because it would produce "a workable rule capable of predictable application by state officials and lower courts."[250] On the other hand, a state regulation that involves dependent discrimination should be judged by "effects on commerce in transit through the state and the state's justification."[251] Not surprisingly, these formalist categories offer the illusion of fine-line distinctions without meaningful clarity in practice.

If they were adopted, how should the Court label a state regulation that discriminates against interstate commerce only when other states' laws are taken into account? The North Carolina regulation in *Hunt* lacked facial discrimination but produced discriminatory effects once the Washington state laws were taken into account. The problem not adequately addressed by Collins is whether a regulation should be presumed invalid if purposeful discrimination were evident in the legislature's motive or intent. Under Collins' model, the validity of the North Carolina regulation would turn "on factors other than discrimination."[252] This approach seems unsound as a device for rooting out protectionism in whatever form it might take.

Assume the Court reviews a regulation that burdens commerce irrespective of whether other states' laws are taken into account. All state regulations must burden interstate commerce to some extent unless all states have adopted similar, uniform regulations. Suppose State *X* adopts a law against radar detectors pursuant to its state police powers. All other neighboring states decline to adopt a similar regulation. In theory, there must exist some detectable, incidental effect on interstate commerce because speeding motorists do not travel through State *X*.[253]

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248. Collins, *supra* note 207, at 555-56.

249. *Id.* at 556.

250. *Id.*

251. *Id.*

252. *Id.*

253. Supreme Court decisions suggest that few, if any, activities do not constitute "commerce." *See generally* Perez v. United States, 402 U.S. 146 (1971) (holding that individual

Under Collins' proposal, this regulation would be upheld by the Court from a discrimination standpoint. Collins acknowledges that "[m]any state laws have collateral effects on their neighbors, and most of them are not suspect on that account alone."[254] Collins fails, however, to identify in his model what criteria are sufficient to distinguish between dependent discrimination in the radar detector hypothetical and dependent discrimination in *Hunt*, which in effect prohibited Washington from marketing and selling its apples in North Carolina. Should dependent discrimination that has the effect of the most protectionist independent discrimination be suspect on that account alone? While Collins argues that many more states' laws will fall "[i]f the same presumption is mindlessly extended to dependent discrimination,"[255] he fails to recognize that justification might exist for such an expansion if dependent discrimination produces the same effect as independent discrimination. Otherwise, the labels will not match up with the real discriminatory effects on interstate commerce. The question should be whether the Court can draw a clear line between permissible and impermissible regulation. Collins offers false clarity, because dependent discrimination can disrupt interstate commerce as much as independent discrimination. Artful drafting of neutral regulations should not be rewarded with more protection from the Court if these regulations result in discrimination that proves disruptive in effect.

Professor Farber calls for judicial intervention only where an intent to discriminate against interstate commerce can be proved.[256] Farber aims not so much to prevent purposeful discrimination as to protect interstate businesses from intentional discrimination. The distinction is noteworthy because intentional discrimination gleaned from a formal legislative history might not reveal underlying discriminatory motives at work.[257] For example, suppose

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loansharking of a purely intrastate nature constitutes interstate commerce); Wickard v. Filburn, 317 U.S. 111 (1942) (finding that wheat for home consumption has sufficient effects on interstate commerce in the aggregate to constitute "commerce" under the Commerce Clause).

254. Collins, *supra* note 207, at 576.

255. *Id.* at 583.

256. *See supra* note 208.

257. For one of the best illustrations of the practical distinction between legislative intent and legislative motive, see Jonathan R. Macey, *Special Interest Groups Legislation and the Judicial Function: The Dilemma of Glass-Steagall*, 33 EMORY L.J. 1 (1984). Macey examines the legislative history behind the Glass-Steagall Act to demonstrate how the formal intentions articulated in the statute do not survive strict scrutiny. "It is from analysis of this history that the gulf between the ostensible legislative intent and the actual legislative motive underlying the Act becomes clear." *Id.* at 11. After a comprehensive critique of the formal intentions articulated in the statute and a review of the special interest group pressure brought to bear on Congress, *id.* at 15-21, Macey concludes that legislative motive best explains enactment of the statute: "Justice Harlan's dissent in *Camp* ignores the important distinction in statutory analysis between legislative motive and legislative *intent*." *Id.* at 20-21. Macey also quotes Judge Posner: "Courts look to the language of the statute, to the legislative history and to other

State *X* decides to raise the construction and safety standards for modular housing, and the legislative history cites consumer complaints and safety hazards in explaining the legislative intent behind the measure. Suppose further that the rate of consumer complaints about modular housing is below the national average and that State *X* ranks in the top ten states nationwide with respect to its safety record. Industry experts suggest that the new standards would have a nominal impact on the state's national rankings. Within State *X*, the struggling modular housing industry has lobbied members of the state legislature for tighter construction and safety standards, which are already met by the domestic manufacturers. Ninety-five percent of out-of-state firms, however, would be unable to meet these new standards without heavy capital investment. Most members of the legislature have received financial contributions from the domestic industry.

Farber's model provides no answer to the dilemma of discriminatory motive posed above. Although Farber argues that "racial discrimination need not be evident on the face of [a] statute . . . and the same rules could be applied in the commerce clause context",[258] he fails to identify in his argument what criteria are sufficient to distinguish discriminatory intent from the discriminatory motive in *Dean Milk Co.* that the Court deemed impermissible.[259]

Even if good intent or bad motive discrimination should be immunized from judicial review, then it is necessary to acknowledge and draw a meaningful distinction between discriminatory intent and discriminatory motive, but Farber fails to do this. Normally, the Court will not inquire into the motives of legislators in determining the constitutionality of a regulation.[260] This rule of law has served an invaluable purpose: keeping the

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evidence of legislative intent, but they do not speculate on the motives of the legislators in enacting the statute." *Id.* at 21 (quoting Richard A. Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263, 272 (1982)).

258. Farber, *supra* note 172, at 405. As my introduction suggests, I disagree with Farber's conclusion. I think the analogy between the Equal Protection Clause and the dormant Commerce Clause misreads commerce as civil rights. Civil rights influences the post-Civil War Constitution in a manner unlike the protection of commerce. *See* Edwards v. California, 314 U.S. 160, 177 (1941) (Douglas, J., concurring) (urging the Court to distinguish as a constitutional value civil rights from mere protection of commerce).

259. *See infra* notes 317-319. *See also* City of Philadelphia v. New Jersey, 437 U.S. 617, 626 (1978); Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 350 (1977).

260. *See* United States v. O'Brien, 391 U.S. 367 (1968); Barenblatt v. United States, 360 U.S. 109 (1959); Fletcher v. Peck, 6 Cranch 87 (1810). *But see* Wallace v. Jaffree, 472 U.S. 38, 56 (1985); Rogers v. Lodge, 458 U.S. 613, 617 (1982); Washington v. Davis, 426 U.S. 229, 242 (1976). Even if courts wanted to inquire, they might not be able to. *But see* William H. Page, *Interest Groups, Antitrust, and State Regulation:* Parker v. Brown *in the Economic Theory of Legislation*, 1987 DUKE L.J. 618, 647 ("State legislative histories, such as committee reports and floor debates, are rarely maintained. Still less common are records of municipal and

Court out of the arena of problematic inquiries into legislators' personal motives.[261]

The "flip-side" of the argument reflects the inherent tension between discriminatory intent and discriminatory motive. If the Court cares about discriminatory intent and nothing else, how should a bad faith *Dean Milk Co.* legislature respond? Under a discriminatory intent standard, a legislature could either give up its discriminatory intent and join the union of free-trade-loving states or the legislature could artfully conceal a purpose to discriminate against interstate goods. Assuming the hypothetical *Dean Milk Co.* legislature gives up its discriminatory intent, then Farber's model has successfully altered legislative behavior away from discrimination.

Yet, Farber's model cannot prevent a *Dean Milk Co.* legislature from making a bad choice. If, as Justice Clark feared, the legislature chooses to conceal its discriminatory purpose, a judicial search for intentional discrimination against interstate commerce will turn up nothing and the discriminatory regulation will be upheld.[262] The model thus breaks down over time because a review for intent alone cannot protect interstate businesses from discrimination against interstate commerce as more and more states become wise to the *Dean Milk Co.* loophole.

The Court itself has recognized the inadequacy of a narrow standard based on intent to discriminate.[263] The Court senses that such a standard alone will

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administrative deliberation."); William M. Schrier, Note, *The Guardian or the Ward: For Whom Does the Statute Toll?*, 71 B.U. L. REV. 575, 578 n.23 (1991) ("[M]ost statutes do not explicitly state the underlying legislative intent and . . . published state legislative histories are usually unavailable."); Elizabeth A. McNellie, Note, *The Use of Extrinsic Aids in the Interpretation of Popularly Enacted Legislation*, 89 COLUM. L. REV. 157, 164 n.46 (1989) ("In California, the courts have access to occasionally recorded committee hearings, sponsors' statements or memos prepared by legislative counsel, and records of all amendments. Debates are not recorded.").

261. *See* LIEBERMAN, *supra* note 179, at 335.

262. *Dean Milk Co.*, 340 U.S. at 354.

263. *See* Exxon Corp. v. Governor of Md., 437 U.S. 117, 136-50 (1978) (Blackmun, J., concurring in part and dissenting in part). There Justice Blackmun wrote that

> The State or local authority need not intend to discriminate in order to offend the policy of maintaining a free-flowing national economy. As demonstrated in *Hunt*, a statute that on its face restricts both intrastate and interstate transactions may violate the Clause by having the 'practical effect' of discriminating in its operation . . . . ("To begin with, the fact that no discrimination was intended is irrelevant where, as here, discriminatory effects result from the statutory scheme.")

Id.; see also Hunt v. Washington Apple Advertising Comm'n, 432 U.S. 333, 352-53 (1977) ("[W]e need not ascribe an economic protection motive to the [legislature] to resolve this case; we conclude that the challenged statute cannot stand insofar as it prohibits the display of Washington State grades even if enacted for the declared purpose of protecting consumers from deception and fraud in the marketplace."); Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 476 n.2 (1981) ("Under the Commerce Clause, a court is empowered to disregard a legislature's statement of purpose if it considers it a pretext.").

not prevent discrimination against interstate commerce. A framework for reforming discrimination doctrine must build upon both the Regan and Farber approaches and complete the necessary inquiry by the Court by addressing the issue of discrimination in effect.

Professor Earl M. Maltz begins to provide an answer in his treatment of "[t]he question of how much state regulation of interstate commerce is too much . . ."[264] Maltz believes the Commerce Clause should be interpreted as banning two types of state regulations: (1) those that facially discriminate "against out-of-state consumers or producers" and (2) those that, "while facially neutral, [are] intended to protect local industry from outside competition."[265] Maltz's approach is appealing because, while a basic intuition that some types of state regulation are simply "too much" pervades the caselaw, the Court has not been clear in drawing a line between what is permissible and what is impermissible.[266]

Maltz's argument emphasizes the importance of free trade values: business persons should be able to locate freely in any state and should have access to resources and markets throughout the United States.[267] Moreover, buyers should not be disadvantaged because of their "state of origin" in acquiring goods produced throughout the states.[268] Illustrating the principle that state boundaries should not impede the movement of goods, Maltz chooses *Polar Ice Cream & Creamery Co. v. Andrews*[269] as his paradigm. In that case, Florida required a local milk distributor to buy milk from in-state producers and pay an above-market price per gallon for it.[270] The law effectively prevented out-of-state dairy farmers from selling to in-state milk

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264. Maltz, *supra* note 74, at 47.

265. *Id.* at 67.

266. *Exxon Corp.*, 437 U.S. at 136 (1978) (Blackmun, J., concurring in part and dissenting in part) ("As demonstrated in *Hunt*, a statute that on its face restricts both intrastate and interstate transactions may violate the Clause by having the 'practical effect' of discriminating in its operation."); City of Philadelphia v. New Jersey, 437 U.S. 617, 623 (1978) ("The bounds of [the Commerce Clause's] restraints appear nowhere in the words of the Commerce Clause, but have emerged gradually in the decisions of this Court giving effect to its basic purpose.") (citation omitted); Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 443-444 (1960) (stating that while states may legislate on subjects touching on "health, life, and safety of their citizens" and indirectly affect commerce in the process, "a state may not impose a burden which materially affects interstate commerce in an area where uniformity of regulation is necessary.") (citations omitted); *Dean Milk Co.*, 340 U.S. 349, 354 (1951) (explaining that "even in the exercise of its unquestioned power to protect the health and safety of its people", the City of Madison, Wisconsin, cannot exclude "in practical effect . . . wholesome milk produced and pasteurized in Illinois" if reasonable nondiscriminatory alternatives, adequate to conserve legitimate local interests, are available.); H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 531-32 (1949).

267. *See* Maltz, *supra* note 74, at 65.

268. *Id.*

269. 375 U.S. 361 (1964).

270. *Id.* at 364.

distributors.[271] Not surprisingly, the Court struck down the regulation as a violation of the Commerce Clause.[272]

Maltz commends the result because the state had clearly prioritized "local interest over out-of-state competitors."[273] Florida used its regulatory power to exclude outside dairy farmers from its markets based on their out-of-state status. Such use of regulatory power undermines the free trade values of the Commerce Clause. In short, Florida had erected a barrier to the movement of milk based solely on state boundaries.

Most state legislatures, however, will not provide such obvious protectionism vulnerable to challenge under the Commerce Clause.[274] A more sensible approach would begin with an avowedly difficult case of state regulation as a paradigm, the assumption being that the easy cases will take care of themselves if a principled framework can be constructed to resolve more difficult cases. This Article argues that *Hunt* provides a more sound premise for reform of the dormant Commerce Clause. Without the benefit of facial discrimination in North Carolina's regulation, the *Hunt* court recognized the disparate impact of the regulation. The Court refused to permit North Carolina to strip the competitive advantages of outsiders, thus revealing judicial insight at its best. The *Hunt* Court faced a particularly difficult challenge because the regulation failed to discriminate on its face, requiring the Court to go beyond the facial purpose of the regulation and examine the real market impact on competitive advantage. These lessons of *Hunt* can better instruct doctrinal reform because, in this context, state regulation is about the "hunt" for advantage.

For Maltz, the root concern should be monitoring state regulations so "that state boundaries per se [do not become] barriers to the movement of goods across the United States."[275] The ability of goods to move freely across state lines should certainly inform dormant Commerce Clause jurisprudence. However, a difficulty with Maltz's conception stems from its

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271. *Id.* at 376.

272. *Id.* at 373.

273. Maltz, *supra* note 74 at 65. One could also argue that in-state distributors of milk were prevented from buying milk from out-of-state dairy farmers, thus providing another violation of the free trade concept. However, Maltz chooses to focus on the disadvantage to out-of-state producers. *See id.*

274. Maltz's discussion freely acknowledges the grey area between clear discrimination and a valid regulation of commerce. *Id.* at 67-81. In his effort to provide a comprehensive understanding of how much regulation is too much, he handles the grey area problem by creating many exceptions to his argument. *Id.*

This article attempts to integrate the manner in which the court reviews all state regulations of commerce, irrespective of the regulation's guise. Of course, this article might be open to the same criticism to the extent it does not address state taxation or state participation in the marketplace.

275. *Id.* at 65.

narrowness—movement of goods. The Court has consistently recognized that the breadth and scope of commerce encompasses more than the mere shipment of goods. Lottery tickets,[276] kidnapping,[277] motel service,[278] restaurant service,[279] loansharking,[280] and even prostitution[281] are various activities that the Court has deemed subject to regulation under the Commerce Clause. Maltz's understanding of the basic idea behind the Commerce Clause might understate the expansive scope of the commerce power. In short, Maltz's free location principle might be responsive to the specific problem of movement of goods but is less effective for addressing other activities under the Commerce Clause.

Even if the free location principle is appropriate, Maltz does not show why his reliance on legislative intent[282] will properly draw a line between permissible and impermissible regulation. He argues that the free location principle might invalidate regulations "that are facially neutral"[283] if the regulations displace competitive advantages but warns that "this analysis . . . could easily be carried too far."[284] Although Maltz offers that "legislative intent" should separate permissible from impermissible regulations under the free location principle, a focus on legislative intent fails to remedy the problems of concealed legislative motive and plain discriminatory effect against interstate commerce. Maltz's use of legislative intent would not define the clear degree of discrimination sufficient to invalidate regulations for two reasons: Either a bad-faith legislature could conceal its intent as Justice Clark warned in *Dean Milk Co.*[285] or legislation could in effect prohibit the importation of goods under a facially neutral regulation with a nonprotectionist purpose.[286] These are serious omissions in Maltz's model, omissions that foreshadow a blurring of a bright-line distinction between permissible and impermissible regulations.

C. Summary

The next Section argues that a focus on discrimination against commercial interests outside a state can better mark a coherent line between permissible

276. Lottery Case, 188 U.S. 321 (1903).
277. Gooch v. United States, 297 U.S. 124 (1936).
278. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).
279. Katzenbach v. McClung, 379 U.S. 294 (1964).
280. Perez v. United States, 402 U.S. 146 (1971).
281. Hoke v. United States, 227 U.S. 308 (1913).
282. Maltz, *supra* note 74, at 66.
283. *Id.* at 66.
284. *Id.*
285. *See Dean Milk Co.*, 340 U.S. at 354.
286. *See Hunt*, 432 U.S. at 352-53.

and impermissible regulation. Maltz recognizes that the difficult task in Commerce Clause jurisprudence is developing some principled approach for deciding why some regulations of commerce are too much. In a sense, Maltz's discussion leads the academic priesthood in the appropriate direction. His choice of principles, however, is too easily manipulated. For example, *Hunt* makes the strong case that facially neutral regulations should be suspect if the result is to strip away competitive advantages from out-of-staters in the marketplace. Moreover, a protectionist intent standard for banning a state's regulation might not safeguard the movement of goods across state boundaries.

This criticism is tempered by a sense that Maltz is closer to asking the right questions than other proponents of doctrinal reform. Collins, Tushnet, and Regan all offer serious ways for bringing coherence into the jurisprudence. However, Maltz advances the academic discussion by asking the right question about how things might be, while the contributions of Collins, Tushnet, and Regan address matters as they are.

Of course, the easiest solution would be to discard the entire doctrine. This decision might make the most sense but for the questionable assumptions scholars are forced to make. Farber, Breker-Cooper, Friedman, and Eule all share an unwarranted faith in either the ability of other constitutional provisions to police state interference with interstate commerce, the ability of administrative agencies to step into the role now fulfilled by judicial review, or the ability of Congress to replace the Court as a decisionmaker. Unless all of these assumptions can be made, the more prudent course would be to improve the doctrine by asking the right question: Can a principled distinction be drawn between permissible and impermissible regulation?

IV. A DISCRIMINATION IN EFFECT MODEL FOR COMMERCE CLAUSE ANALYSIS

This Section describes a model that better defines the line between permissible and impermissible state regulation under the dormant Commerce Clause than current doctrine and previous scholarship. This Section shows that the extent of discrimination in effect can separate permissible from impermissible regulation in a manner that respects the traditional deference afforded states in the area of public health and safety, while at the same time subjecting to rigorous scrutiny economic regulations that traditionally have been suspect. This model can effectively resolve challenges to regulations in a clear and consistent fashion. In those instances in which a state has not regulated, such as the market participant exception[287] and state taxation of

287. "*Alexandria Scrap*, little noted at the time, established that '[n]othing in the purposes animating the commerce clause prohibits a state, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others.'" TRIBE,

commerce,[288] prevailing doctrinal principles should be applied by the Court.[289] Discrimination should be understood as including the aggressive and protectionist sides to state-induced disadvantage of commercial interests without a state. Generally, the Court uses the language of "discrimination against"[290] interstate commerce or some equivalent to convey the sense of opposition to interstate commerce. The stance taken on interstate commerce captures the component of discrimination that is outwardly directed. But an effective definition of discrimination must also recognize the inward component of protectionism, a protective action favoring intrastate commerce. Generally, the Court will refer to local industries or some equivalent to convey the sense of defensiveness.[291] Perhaps the image of shields held high by

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supra note 179, at 430; *see also* Charles Gray, *Keeping the Home Team at Home*, 74 CAL. L. REV. 1329, 1344 (1986) (explaining that the market participant doctrine states "'that if a state is acting as a market participant, rather than as a market regulator, the dormant Commerce Clause places no limitation on its activities'" (quoting South-Central Timber Dev. v. Wunnicke, 467 U.S. 82, 93 (1984)); Ivy B. Dodes, Note, *The Delaware Takeover Statute: Constitutionally Infirm Even Under the Market Participant Exception*, 17 HOFSTRA L. REV. 203, 227 n.134 (1988); Michael R. Harpring, *Comment: Out Like Yesterday's Garbage: Municipal Solid Waste and the Need For Congressional Action*, 40 CATH. U. L. REV. 851, 872 (1991).

The Court has imposed limits on the ability of a state to discriminate pursuant to the market participant doctrine. In a leading case, South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82 (1984), the Court denied the State of Alaska the ability to require purchasers of state-owned timber to process the timber within Alaska. LIEBERMAN, *supra* note 179, at 322. Jonathan Phillip Meyers, Note, *Confronting the Garbage Crisis: Increased Federal Involvement As a Means of Addressing Municipal Solid Waste Disposal*, 79 GA. L.J. 567, 575 (1991) (explaining that the rationale behind the exception is that when a state is participating in a market, its role is analogous to that of a private firm, and therefore the state should be allowed to choose with whom it wants to do business); Frank I. Michelman, *The Supreme Court, 1985 Term: Forward: Traces of Self-Government*, 100 HARV. L. REV. 4, 56 n. 294 (1986).

288. TRIBE, *supra* note 179, at 442 ("Thus, a state tax does not offend the Commerce Clause if it (1) is applied to an activity with a substantial nexus with the taxing state, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to services provided by the state."); STONE, *supra* note 213 at 314-15 ("As the discussion of Complete Auto Transit indicates, the stated tests in cases challenging taxes as undue burdens on interstate commerce differ from the stated tests in cases challenging regulations."); David Elliott Prange, Note, *Regional Water Scarcity and the Galloway Proposal*, 17 ENVTL. L. 81, 102 (1986); Bruce B. Weyhrauch, Note, South-Central Timber Development, Inc. v. Wunnicke: *The Commerce Clause and the Market Participant Doctrine*, 15 ENVTL. L. 593, 610 n.110 (1985).

For an overview of how state taxation doctrine developed prior to *Complete Auto Transit, Inc.*, see R. Douglas Harmon, Note, *Judicial Review Under* Complete Auto Transit*: When Is A State Tax on Energy-Producing Resources "Fairly Related"?*, 1982 DUKE L.J. 682, 684-86.

289. *Cf.* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) (suggesting that state taxation of commerce might not be different from state regulation).

290. *See, e.g.*, Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 461 (1981); Exxon Corp. v. Governor of Md., 437 U.S. 117, 125 (1978); Bendix Autolite Corp. v. Midwesco Enters. Inc., 486 U.S. 888, 898 (1988) (Scalia, J., concurring).

291. *See, e.g.*, Maine v. Taylor, 477 U.S. 131, 148 (1986) ("Shielding in-state industries

guardsmen best captures the isolationist spirit of "protectionism" as an inwardly directed phenomena.

With this understanding of discrimination, permissible regulation should be defined by *the real effects of a regulation upon interstate commerce.*[292] When an economic regulation discriminates in effect to the disadvantage of commercial interests outside a state, a heavy presumption should operate against the regulation's validity. When a public health and safety regulation[293] discriminates in effect to the disadvantage of commercial interests outside a state, a heavy presumption should fall in favor of the regulation. In both cases, the presumption may be overcome by contrary evidence.

In the context of the Commerce Clause, the Court has not hesitated to strike down economic regulations, particularly those that treat interests outside the state differently from those inside the state.[294] Under a discrimination

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from out-of-state competition is almost never a legitimate local purpose, and state laws that amount to 'simple economic protectionism' consequently have been subject to a 'virtually *per se* rule of invalidity.'" (quoting city of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978)); Hunt v. Washington Apple Advertising Comm'n, 432 U.S. 333, 351 (1977) ("Obviously, the increased costs imposed by the statute would tend to shield the local apple industry from the competition of Washington apple growers and dealers who are already at a competitive disadvantage because of their great distance from the North Carolina market."); Baldwin v. Seelig, 294 U.S. 511, 522 (1935) ("If New York, . . . to promote the economic welfare of her farmers, may guard them against competition with the cheaper prices of Vermont, the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation.").

292. This principle for defining permissible regulation is paraphrased from Tribe's description of the Court's decisionmaking in the area of state taxation. TRIBE, *supra* note 179, at 442. The Court has alluded to a similar principle in defining the focus of its review of regulations under the dormant Commerce Clause: "In either situation [application of the *per se* rule of invalidity or the balancing approach] the critical consideration is the overall effect of the statute on both local and interstate activity." Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 579 (1986); *see also* Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 37 (1980) ("The principal focus of inquiry must be the practical operation of the statute, since the validity of state laws must be judged chiefly in terms of their probable effects.").

293. *See* Maine v. Taylor, 477 U.S. 131 (1986) (quarantine measures); South Carolina State Highway Dep't v. Barnwell Bros., Inc., 303 U.S. 177 (1938) (width and weight restrictions on trucks using state highways); Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981) (restrictions on plastic, nonreturnable, nonrefillable containers); *see* Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960) (smoke abatement measures); Mintz v. Baldwin, 289 U.S. 346 (1933) (certification requirements that all cattle coming into the state are free from Bang's disease); Erb v. Morasch, 177 U.S. 584 (1900) (restrictions on train speed within city limits); Willson v. Black Bird Creek Marsh Co., 27 U.S. (2 Pet.) 245 (1829) (damming of a creek where health of area inhabitants has been improved).

294. Brown-Forman Distillers Corp. v. New York Liquor Auth., 476 U.S. 573, 578-79 (1986) (The Court will strike down economic regulations that "directly regulate[] or discriminate[] against interstate commerce, or when [their] effect is to favor in-state economic interests over out-of-state interests...."); City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978) ("Thus, where simple economic protectionism is effected by state legislation, a virtually *per se*

in effect model, regulations governing commercial operations would be presumed invalid if commercial interests outside the state were disadvantaged in effect.[295] The inquiry would focus on discrimination in effect alone. The disadvantage to outside commercial interests is caused by the effect of a regulation in operation, not the purpose of legislators. Thus arguments about purpose would be insufficient by themselves. Evidence of a lack of purposeful discrimination plus health and safety interests would be admissible as contrary evidence to overcome the presumption of invalidity, but the focus would remain on the discriminatory effect of the challenged regulation. Even if commercial interests could show that legislators enacted an economic regulation with a discriminatory purpose in mind, this showing would not raise a presumption of invalidity unless coupled with discrimination in effect to the disadvantage of commercial interests.

Traditional deference would be afforded to health and safety regulations.[296] Under this discrimination-in-effect model, health and safety

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rule of invalidity has been erected."); TRIBE, *supra* note 179, at 413-14 ("State efforts to protect local economic interests through measures limiting access to local markets by out-of-state sellers or suppliers have repeatedly been struck down as inconsistent with the principles underlying the commerce clause."). *But see* LIEBERMAN, *supra* note 179, at 174 ("Until the New Deal, the Court had discerned many constitutional impediments to one or another form of economic legislation. Today those impediments have practically vanished.").

295. Discrimination to the disadvantage of out-of-state commercial interests would include: raising the cost of doing business for out-of-state commercial interests while leaving those of in-state commercial counterparts unaffected, Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 351 (1977); "stripping away from the out-of-state commercial interest the competitive and economic advantages it had earned for itself," *id.*; "having a leveling effect that insidiously operates to the advantage of local commercial interests," *id.*; "controlling prices in other states," Brown-Forman Distillers Corp. v. New York Liquor Auth., 476 U.S. 573, 583 (1986); promoting the economic welfare of one's own commercial interests by guarding them against competition with the cheaper prices of another state, Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 522 (1935); "discriminat[ing] against interstate commerce by applying a disadvantageous rule against nonresidents for no valid state purpose that requires such a rule," Bendix Autolite Corp. v. Midwesco Enterprises, Inc., 486 U.S. 888, 898 (1988) (Scalia, J., concurring); and excluding out-of-state commercial interests from business dealings within state, Dean Milk Co. v. City of Madison, 340 U.S. 349, 354 (1951).

296. *See, e.g., Taylor*, 477 U.S. at 151 ("As long as a State does not needlessly obstruct interstate trade or attempt to 'place itself in a position of economic isolation,' Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 527 (1935), it retains broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources."); City of Philadelphia v. New Jersey, 437 U.S. 617, 631 (1978) (Rehnquist, J., dissenting) ("[Q]uarantine laws have not been considered forbidden protectionist measures, *even though they were directed against out-of-state commerce.*"); *Dean Milk Co.*, 340 U.S. at 358 (Black, J., dissenting) ("Since the days of Chief Justice Marshall, federal courts have left states and municipalities free to pass bona fide health regulations subject only 'to the paramount authority of Congress if it decides to assume control . . . . '"); H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 531-32 (1949) ("[Justice Cardozo's opinion in Baldwin v. G.A.F. Seelig, Inc.] recognized, as we do, broad power in the State to protect its inhabitants against perils to health or safety, fraudulent traders and highway

regulations that disadvantage commercial interests out-of-state nonetheless would be presumed valid. Evidence of discrimination would be similar to criteria used for economic regulations. To overcome this presumption of validity, challengers of a health and safety regulation would have to show evidence of purposeful discrimination.[297]

Under this presumption, an interesting phenomenon might occur. Assume that a state regulation advanced health and safety objectives. Unlike the *Dean Milk Co.* scenario, the hypothetical state may protect the quality of its air. There is no hidden protectionist objective among the policymakers. One could envision a situation in which a health and safety regulation produced the same effect in the marketplace as did the most rigid embargo. Should such a measure be valid under a model that uses discrimination in effect as a benchmark?[298]

From an analytical standpoint, this regulation should be presumed valid. First, as a practical matter, such a regulation probably would function as quarantine. Assuming that the regulation is clearly designed to prohibit the importation of deleterious elements (e.g., automobile smog) the presumption should sensibly stand. Rather than a flaw, such application illustrates the responsiveness of the model to contingencies that might not otherwise be adequately addressed by regulation. Second, application of the presumption in this example is consistent with precedent. In fact, the hypothetical is based upon *Huron Portland Cement Co. v. City of Detroit*,[299] in which the court upheld enforcement of a City Smoke Abatement Code against an out-of-state corporation. The Code adversely affected interstate commerce because compliance required "[s]tructural alterations"[300] in ships engaged in interstate commerce. Third, while discrimination in effect against commercial interests outside a state is used as a benchmark, the objective is not to overrule those regulations that have customarily been upheld as valid quarantines or regulations that advance the health and safety of the community. Rather, the

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hazards, even by use of measures which bear adversely upon interstate commerce."); South Carolina State Highway Dep't. v. Barnwell Bros., Inc., 303 U.S. 177, 189 (1938) ("In the absence of national legislation especially covering the subject of interstate commerce, the State may rightly prescribe uniform regulations adapted to promote safety upon its highways and the conservation of their use, applicable alike to vehicles moving in interstate commerce and those of its own citizens.").

297. While I generally would define purposeful discrimination as equivalent to Regan's "purposeful protectionism," Regan's terminology is less precise because he does not recognize that discrimination has both an aggressive and protectionist side. Protectionism merely captures the defensive (not the aggressive) element of state regulation resulting in disadvantage to commercial interests without the state. *See supra* notes 290-91 and accompanying text.

298. I am indebted to my colleague, Michael R. Belknap, for bringing this point to my attention.

299. 362 U.S. 440 (1960).

300. *Id.* at 441.

point is to provide a principled explanation for why these discriminatory health and safety regulations should be and have been permissible.

Obviously, this model makes classification important. Presumptions will turn on whether a regulation "is fairly related to [public health and safety] services provided by the state."[301] In other words, does a reasonable interpretation of a regulation's effect fall within the Court's traditional definition of a state's health and safety power?[302] If so, then the traditional presumption of validity of public health and safety measures should apply. Of course, as in the *Hunt v. Washington State Apple Advertising Comm'n*,[303] a regulation should not be considered a health and safety measure if "the challenged statute does remarkably little to further that laudable goal . . . ."[304] In the case of clear economic effect, the measure should be considered an economic regulation and presumed impermissible.

In deciding whether a regulation should reasonably be considered economic, evidence of purpose is significant evidence on the issue of discrimination in effect. Regan takes the precisely opposite stance in his proposal: "Protectionist effect will matter only as evidence of protectionist purpose. As evidence, protectionist effect may matter a great deal, since effect is often the best evidence of purpose. But purpose will be the key."[305] I disagree with Regan's stance because it fails to heed the lessons of *Hunt* in which a state with an ostensibly good purpose enacted a regulation with discrimination in effect against Washington State apples.[306] But Regan's description of how contrary evidence bears upon presumptions can be readily applied in a discrimination-in-effect model as follows: "[a] state that passes a law with significant [discriminatory purpose] would be well advised to offer the court some innocent explanation."[307] An explanation of how a health and safety purpose is furthered should lead the Court to classify a regulation as a health and safety regulation in doubtful cases, thus gaining the advantage of the presumption of validity.[308] Assuming, however, that a regulation is

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301. TRIBE, *supra* note 179, at 442. Deciding whether a regulation bears a fair relation to health and safety or economic effects seems eminently sensible as a means of defining statutes under a discrimination in effect model.

302. *See infra* note 319 and accompanying text.

303. 432 U.S. 333 (1977).

304. *Id.* at 353. Although North Carolina had ostensibly "enacted [a regulation requiring all apples sold or shipped into the State to have no grade other than the applicable federal grade on the container] for the declared purpose of protecting consumers from deception and fraud in the marketplace", the Court reasoned that the measure in effect "magnifies [consumer problems] by depriving purchasers of all information concerning the quality of the contents of closed apple containers." *Id.* at 353.

305. Regan, *supra* note 8, at 1137.

306. *See supra* notes 103-14 and accompanying text.

307. Regan, *supra* note 8, at 1136.

308. This treatment of mixed effects furthered by a regulation is analogous to the Court's

clearly economic in effect, contrary evidence of a health and safety purpose furthered by the regulation should overcome the presumption of invalidity.

This discrimination-in-effect model will move the inquiry back into motive à la *Dean Milk Co.*[309] but only to the extent of providing evidence about whether a regulation is fairly characterized as a health and safety measure and whether such presumption can be overcome by contrary motivations. So, motive plays a role in applying the effects model, but it does not become the focus of the inquiry. The answer to whether a regulation is permissible or impermissible remains centered on the extent of discrimination in effect.

This model comes into play when a regulation has discriminated against commercial interests from outside a state. When a regulation does not disadvantage commercial interests outside a state, the Court does not have a basis to review a regulation for discrimination in effect. Thus, facial discrimination in a regulation would be insufficient for judicial review unless accompanied by discrimination in effect.[310] Without discrimination in effect, there is no cause of action for discrimination under the dormant Commerce Clause.

In summary, a discrimination-in-effect inquiry better marks the line between permissible and impermissible regulation. Under the current doctrine, the Court is not always clear about what factors enter a balancing test, whether discrimination exists, and, if so, whether benefits flow to the state from the regulation and whether less restrictive alternatives exist to the challenged measure. In practice, the discrimination-in-effect model might mean that health and safety regulations are presumed valid, notwithstanding real disadvantage to commercial interests from without the state. Assuming there is no hidden protectionist motive at work, such a result should be unremarkable and fairly consistent with quarantine caselaw and traditional deference to health and safety regulation. The traditional deference to health and safety measures is preserved to the greatest extent possible, yet economic measures retain their disfavor under the dormant Commerce Clause. The model is sufficiently flexible so that contrary evidence of purposeful discrimination or the lack thereof can overcome presumptions. Most importantly, this model gives clear and consistent guidance about the limits of permissible discrimination in effect without the need for intricate exceptions and qualifications.[311]

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treatment of regulations under the Takings Clause that further prohibited both private and permissible public purposes. *See* Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229 (1984).

309. *See infra* notes 317-19 and accompanying text.

310. The same principle can be applied to facially neutral statutes as well. Discrimination in effect provides the touchstone for judicial review, regardless of a discriminatory intent or motive. These issues, as discussed earlier, should bear upon evidentiary questions of classification and effect but should not in and of themselves provide a challenger with sufficient standing to bring suit. Challengers of discriminatory regulations suffer actual injury due to the disadvantage inflicted by the challenged regulation, not formal or concealed expressions of purpose.

311. *See* Maltz, *supra* note 74 at 67-85. As noted earlier, this model does not encompass

This Section has presented a better way for the Court to review regulations under the Commerce Clause when Congress has failed to regulate. The Court can and should approach all commercial activity with an inquiry about the real discrimination in effect. This clear inquiry would better enable the Court to separate permissible from impermissible regulation. Rather than abandon the important role of the Court, a discrimination in effect model builds upon the Court's current discrimination jurisprudence. If the Court adopts this model, state lawmakers and challengers of regulations would have the advantage of consistent decisionmaking tied to the real discrimination in effect suffered by commercial interests from outside a state.

V. SEVERAL ILLUSTRATIONS OF THE DISCRIMINATION IN EFFECT MODEL

This Section illustrates how the proposed model would resolve dormant Commerce Clause cases in a better way than current doctrine. The Section begins by showing how presumptions based on the character of a regulation can offer a logical line between permissible and impermissible regulation. Then, the Section demonstrates how the flexibility of permitting contrary evidence of character or purpose to overcome initial presumptions in a sensible fashion would operate. The Section concludes with examples that highlight difficulties outside the parameters of this model.

A. Presumptions

A raging debate among evidence scholars centers around the significance of presumptions.[312] Some favor the "bursting bubble" theory whereby "a presumption has the effect of shifting the burden of production in order to rebut the presumed fact."[313] Simply put, the presumption disappears "[i]f the party against whom the presumption exists produces contrary evidence . . . ."[314] A competing theory would allow the presumption to "remain until the presumed fact is actually disproven[,]"[315] thus turning the litigation battle

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state participation in the marketplace and taxation because these state actions do not fall within the classic form of state regulation. The prevailing doctrines in these areas would continue to govern under this proposal.

312. *See, e.g.*, Nicholas W. Chase, *The North Dakota Supreme Court's Examination of the Hicks Rationale Prompts the Court to Customize its Own Standard to Review State-Based Employment Discrimination Claims*, 70 N.D. L. REV. 207, 218 n.94 (1994); Catherine J. Lanctot, *The Defendant Lies and the Plaintiff Loses: The Fallacy of the "Pretext-Plus" Rule in Employment Discrimination Cases*, 43 HASTINGS L.J. 57, 104 (1991); Captain Charles E. Trant, *The American Military Insanity Defense: A Moral, Philosophical, and Legal Dilemma*, 99 MIL. L. REV. 1, 95-96 (1983).

313. *See, e.g.*, Chase, *supra* note 312, at 218 n.94.

314. *Id.*

315. *Id.*

into one of persuasion rather than mere production of contrary evidence.

Under the proposed model, the second theory would govern presumptions. Presumptions are central to the functioning of the model; therefore, employing a burden of persuasion rule will better buttress the initial presumptions. Compared to the "bursting bubble" theory, the burden of persuasion approach will increase the burden of proof for litigants introducing contrary evidence.

So, if a regulation is best characterized as a public safety and health measure, the Court should presume the regulation is valid. Challengers would have fair opportunity to overcome this presumption, but the production of a mere scintilla of contrary evidence would not burst the bubble. Rather, challengers would need to disprove facts indicating a health and safety effect.

When a regulation can best be characterized as an economic regulation in effect, then the Court should presume that the regulation is invalid. As with health and safety regulations, this presumption could be overcome with evidence disproving facts about the economic nature of the regulation.

Clear presumptions based on the character of a regulation can offer a logical line between permissible and impermissible regulation. However, for the presumption to be meaningful, the presumption must be overcome by contrary evidence that disproves presumed facts. Any other evidentiary approach could render the presumptions illusory.

B. Contrary Evidence

The presumption should control when litigants are unable to offer contrary evidence to disprove presumed facts. In the case of a health and safety regulation, a litigant wishing to remove the presumption of validity would have the burden of proof on the question of purposeful discrimination. In practice, a litigant would be able to disprove presumed facts by showing that the regulation was enacted with the intent or motive of (1) protecting local commercial interests, (2) disadvantaging out-of-state commercial interests, or more specifically (3) stripping away competitive advantages achieved in the marketplace by out-of-state interests.[316]

For example, the City of Madison in *Dean Milk Co.*[317] only permitted milk pasteurized within five miles of Capitol Square in Madison to be sold in Madison. As a practical matter, the regulation prohibited commercial interests outside the state from selling milk in Madison.[318] Although the city attempted to portray the regulation as a needed health and safety measure to protect the sanitary standards of milk sold within city limits, the evidence indicated that the city likely would have fallen back on an alternative "based on § 11 of

316. *See* Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 350-51 (1976).
317. Dean Milk Co. v. Madison, 340 U.S. 349, 355 (1951).
318. *Id.* at 354.

the Model Milk Ordinance recommended by the United States Public Health Service."[319] This Model Milk Ordinance operated by "exclud[ing] from the municipality milk not produced and pasteurized conformably to standards as high as those enforced by the receiving city."[320] Given the availability of an alternative measure for protecting sanitary standards in the city's milk and the nominal safety benefits of a rigid geographical limitation around Madison, the city would be unable to disprove the facts of the ordinance's economic impact. The ordinance clearly protected in-state economic interests to the disadvantage of out-of-state economic interests.

Even if we assume that the Court characterized the Madison regulation as a health and safety regulation in effect, contrary evidence of a discriminatory purpose would be available to disprove this characterization. First, the regulation offered no safety advantages over the Model Milk Ordinance. The ordinance clearly permitted receiving cities like Madison to insist upon high sanitary standards, thus calling into question the real gains of the ordinance enacted by the city. Second, the ordinance clearly protects local interests in the processing industry without question. Those businesses fortunate enough to be located within five miles of Capitol Square acquired a captive market for their processing services. Third, out-of-state interests were prohibited from selling their milk to Madison buyers unless local processors were used to bottle the milk. Given the nominal evidence of safety gains and the compelling evidence of economic protectionism, the challengers would have little difficulty defeating the presumption favoring a health and safety measure with indications of purposeful discrimination.

C. The Dilemma of Undue Burden

This Subsection discusses the difficulty of addressing nondiscriminatory regulations that burden the flow of interstate commerce.[321] This Subsection argues that the case for abandoning the judicial role is most sensible when weighing the "national and local interests and making a choice as to which of

319. *Id.* at 355.

320. *Id.*

321. *See, e.g.*, Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981) (regulating the length of vehicles that may use Iowa's highways); Raymond Motor Transp. v. Rice, 434 U.S. 429 (1978) (regulating the use of 65-foot doubles within the State); Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959) (regulating the use of a certain type of rear fender mudguard on trucks operating on highways within State not challenged as discriminatory); Southern Pac. Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761 (1945) (regulating operation within the State of railroad trains with more than fourteen passenger or seventy freight cars); Seaboard Air Line Ry. v. Blackwell, 244 U.S. 310 (1917) (requiring trains to blow their whistles and slow down almost to a stop at each grade crossing where numerous grade crossings were involved).

the two *should* prevail. That, as I see the matter, is a policy judgment."[322] Finally, this Subsection outlines the consequences of adopting the proposed discrimination in effect model.

While the proposed model will better resolve dormancy cases than current doctrine, the model creates a judicial blindspot for the Court when burdensome regulations do not discriminate in effect against commercial interests without the state.[323] Current doctrine empowers the Court to protect the flow of interstate commerce by balancing the benefits to a state against the burden on interstate commerce.[324] With balancing, the Court can define undue and thus impermissible burdens on commerce as circumstances in which the burdens outweigh the benefits. The results of balancing in this context can be fairly characterized as inconsistent and unclear[325] but the balancing doctrine provides an important check on burdensome regulations.[326]

Under the proposed model, a regulation that burdens the flow of interstate commerce will be upheld absent discrimination in effect against commercial interests without the State. For example, Illinois passed a regulation "requiring the use of a certain type of rear fender mudguard on trucks and trailers operated on the highways of that State."[327] Because the regulation applied equally to interstate and intrastate commerce, the challengers of the regulation did not allege regulatory discrimination against interstate commerce.[328] The Court found a "rather massive showing of burden on inter-

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322. Dowling, *supra* note 1, at 21.

323. *See Kassel*, 450 U.S. at 674 (Iowa's law added about $12.6 million each year to the costs of trucking companies); *Raymond Motor Transp.*, 434 U.S. at 439 n.14 ("[I]t costs the company in excess of $2 million annually to make the various adjustments in operations."); *Bibb*, 359 U.S. at 525 ("[T]he initial cost of installing those mudguards on all the trucks owned by the appellants ranged from $4,500 to $45,840."); *Seaboard Air Line Ry.*, 244 U.S. at 310 ("[M]ore than six hours would have been added to the schedule time of four hours and thirty minutes."); *Southern Pac.*, 325 U.S. at 772 ("The additional cost of operation of trains complying with the Train Limit Law in Arizona amounts . . . to about $1,000,000 a year.").

324. *See supra* notes 73-75 and accompanying text.

325. *See supra* notes 65-102 and accompanying text.

326. However, Eule states:

> Our needs today differ significantly from those of the 1940s when the Court embraced Professor Dowling's suggestion that its proper role, in the absence of congressional action, was to balance national and local interests in scrutinizing state commercial enactments. Congress, the implied beneficiary of the Court's protection under that standard, no longer needs such assistance.

Eule, *supra* note 14, at 428.

327. *Bibb*, 359 U.S. at 521-22.

328. *Id.* at 523. Assuming the group of interstate motor carriers had made an argument that Illinois's facially neutral regulation discriminated in effect against commercial interests without the State, it is unclear whether the Court would have found impermissible discrimination under the dormant commerce clause. *Compare* Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333 (1977) (finding the state's statute to burden and discriminate against interstate sales)

state commerce"[329] and no safety advantages.[330] Whereas the Illinois regulation would have been upheld under the proposed model for lack of discrimination in effect, the Court concluded that "this is one of those cases—few in number—where local safety measures that are nondiscriminatory place an unconstitutional burden on interstate commerce."[331]

While the result in *Bibb* furthers the national interest in an unburdened flow of commerce, the case involved an inherent weighing of the national interest against the local interest in police power regulation.[332] Policy judgments that require a weighing of the national interest in unburdened free trade against a state's interest in safety are more appropriate for legislative than judicial decisionmaking.[333] Absent discrimination in effect, several reasons support congressional decisionmaking as a better vehicle for deciding when the national interest in an unburdened flow of commerce needs to be furthered.

First, congressional decisionmaking is based upon consensus and compromise.[334] Members of Congress routinely balance national interests

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with Exxon Corp. v. Governor of Md., 437 U.S. 117 (1978) (finding the state statute did not burden or discriminate against interstate commerce).

329. *Bibb*, 359 U.S. at 528.

330. *Id.* at 525. Underscoring the point, the district court found evidence of new safety hazards created by the regulation:

> [T]here is rather convincing testimony that use of the contour flaps creates hazards previously unknown to those using the highways. [Navajo Freight Lines, Inc. v. Bibb, 159 F. Supp. 385, 390 (1958).] These hazards were found to be occasioned by the fact that this new type of mudguard tended to cause an accumulation of heat in the brake drum, thus decreasing the effectiveness of brakes, and by the fact they were susceptible of being hit and bumped when the trucks were backed up and of falling off on the highway.

Id.

331. *Id.* at 529.

332. *Compare id.* at 523 ("The power of the State to regulate the use of its highways is broad and pervasive. We have recognized the peculiarly local nature of this subject of safety, and have upheld state statutes applicable alike to interstate and intrastate commerce, despite the fact that they may have an impact on interstate commerce.") (citations omitted) *with id.* at 529 ("[S]tate regulations that run afoul of the policy of free trade reflected in the Commerce Clause must also bow.").

333. *Cf. supra* notes 65-102 and accompanying text. While this article disagrees with those commentators who urge total removal of the judicial role from the dormant Commerce Clause, the argument for removal of judicial review is strongest when the Court engages in the policymaking of deciding whether *X* safety benefit is greater than *Y* burden on interstate commerce. *See also* Bendix Autolite Corp. v. Midwesco Enters., 486 U.S. 888, 897 (1988) (Scalia, J., concurring).

334. Alan L. Feld, *Separation of Political Powers: Boundaries or Balance?*, 21 GA. L. REV. 171, 178 (1986); Peter E. Quint, *The Separation of Powers Under Carter*, 62 TEX. L. REV. 785, 794 (1984); Mary H. Strobel, Note, *Delegation and Individual Rights*, 56 S. CAL. L. REV. 1321, 1334 (1983).

against local interests in making policy decisions.[335] Accommodating these competing policy interests when "evenhanded state legislation . . . burdens interstate commerce too heavily"[336] is a responsibility tailor-made for the political process.[337]

Second, congressional decisionmaking about the importance of the national interest in the unburdened flow of commerce will be more consistent than judicial decisionmaking.[338] The Court has traditionally deferred to congressional regulation of commerce.[339] Indeed, commentators openly question whether the Commerce Clause as interpreted by the Court has established meaningful limits on the power of Congress to regulate commerce.[340] By way of contrast, the Court has not hesitated to overrule lower courts in their review of state regulation.[341] Thus, congressional decisionmaking about the limits of undue burdens on commerce should be more

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335. *See* Eule, *supra* note 14, at 436 ("Under the Court's present standard, the likelihood of judicial invalidation increases with the degree of burden imposed by state law, and the weight of the national interest. But this is precisely the situation in which action by Congress or administrative agencies is most likely.")

336. *Id.*

337. In 1887 Congress created the Interstate Commerce Commission. Edward C. Donovan, *The Interstate Commerce Commission and the Boundaries of Agency Discretion in Statutory Interpretation*, 60 GEO. WASH. L. REV. 1357, 1357-58 (1992). Designed to regulate the railroad industry, the Commission over the years developed a noteworthy reputation for its independent and balanced decisionmaking. *See, e.g.*, George M. Chandler, *The Interstate Commerce Commission-The First Twenty-Five Years*, 16 TRANSP. L.J. 53 (1987); Paul S. Dempsey, *The Interstate Commerce Commission-The First Century of Economic Regulation*, 16 TRANSP. L.J. 1 (1987). *But see* Paul S. Dempsey, *The Interstate Commerce Commission-Disintegration of an American Legal Institution*, 34 AM. U. L. REV. 1, 2 (1984) (suggesting that many now "view the Commission with contempt").

338. *See* Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283, 303 (1986) (claiming that policy determinations by Congress are much less likely to be overturned by the Court than lower court policy determinations).

339. *See* Perez v. United States, 402 U.S. 146 (1971); Heart of Atlanta Motel, Inc., v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964); Wickard v. Filburn, 317 U.S. 111 (1942); *see also* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985). *But see* New York v. United States, 112 S. Ct. 2408 (1992); National League of Cities v. Usery, 426 U.S. 833 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

340. *See* TRIBE, *supra* note 179, at 316 ("Contemporary commerce clause doctrine grants Congress such broad power that judicial review of the affirmative authorization for congressional action is largely a formality."); LIEBERMAN, *supra* note 179, at 116 ("Today the commerce power gives Congress carte blanche to regulate any aspect of the economy that even remotely 'affects' interstate commerce."). *But see* TRIBE, *supra* note 179, at 313.

341. *See, e.g.*, Maine v. Taylor, 477 U.S. 131 (1986); City of Philadelphia v. New Jersey, 437 U.S. 617 (1978); Dean Milk Co. v. City of City of Madison, 340 U.S. 349 (1951); H.P. Hood & Sons, Inc., v. Du Mond, 336 U.S. 525 (1949); Morgan v. Virginia, 328 U.S. 373 (1946). *But see* Kassel v. Consolidated Freightways, 450 U.S. 662 (1981); Bibb v. Navajo Freight Lines, 359 U.S. 520 (1959).

consistent and stable than judicial decisionmaking.

Third, the national interest in the free flow of commerce[342] warrants federal preemption of burdensome regulations.[343] The Court has long recognized the need for a single uniform national rule where the national interest is at stake.[344] Although

> [t]here is no clear-cut policy pronouncement concerning when or why Congress preempts . . . a predominant function of preemption is to invalidate state laws that frustrate the development of necessary, uniform federal laws. Additionally, preemption often acts as a means of stopping states from interfering with the free flow of goods across state lines.[345]

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342. Great Atl. & Pac. Tea Co. v. Cottrell, 424 U.S. 366, 372 (1976); *Southern Pac.*, 325 U.S. at 796; California v. Thompson, 313 U.S. 109, 116 (1941); Di Santo v. Pennsylvania, 273 U.S. 34, 44 (1927) (Stone, J., dissenting) ("[T]he national interest in maintaining the freedom of commerce across state lines . . ."); *see also*, Marcia Lyn Finkelstein, Note, *Comity and Tragedy: The Case of Rule 407*, 38 VAND. L. REV. 585, 621 n.280 (1985) ("Moreover, the interstate commerce cases indirectly illustrate that safety is a local concern, which the Court has balanced against a national interest in the free flow of commerce.") (citations omitted); John E. Gardner, Editorial Note, *Federal Labor Law Preemption of State Wrongful Discharge Claims*, 58 U. CIN. L. REV. 491, 492 (1989) (explaining that Congress has the power to regulate commerce which affects the national interest under the Commerce Clause to the Constitution).

343. "Under the SUPREMACY CLAUSE [U.S. CONST. art. VI, § 2 federal law preempts—that is supersedes—inconsistent state law." LIEBERMAN, *supra* note 179, at 392. *See* GERALD GUNTHER, CONSTITUTIONAL LAW 291 (12th ed. 1991) ("Congress often plays a decisive role in determining the relations between state and federal power."); David F. Welsh, *Environmental Marketing and Federal Preemption of State Law: Eliminating the "Gray" Behind the "Green"*, 81 CAL. L. REV. 991, 1004 (1993); *see also* Frank S. Alexander, *Mortgage Prepayment: The Trial of Common Sense*, 72 CORNELL L. REV. 288, 335 (1987) (explaining that the federal government preempted state due-on-sale clause provisions due to "market significance of uniform mortgage instruments"); *cf.* Larry J. Gusman, Note, *Rethinking* Boyle v. United Technologies Corp. *Government Contractor Defense: Judicial Preemption of the Doctrine of Separation of Powers?*, 39 AM. U. L. REV. 391, 427-28 (1990) (describing Justice Brennan's observation that justification for federal preemption of state law is congressional action, "not the Court's creative powers"); Dennis Honabach & Roger Dennis, *The Seventh Circuit and the Market for Corporate Control*, 65 CHI.-KENT L. REV. 681, 731 (1989) (recounting Judge Posner's thought that absent discrimination, "a state may legislative aggressively in ways that affect interstate commerce, subject only to federal preemption"). *But see* Ronald D. Rotunda, *The Doctrine of the Inner Political Check, the Dormant Commerce Clause, and Federal Preemption*, 53 TRANSP. PRAC. J. 263, 268 (1986) ("The Commerce Clause does not demand a free trade zone; only the dormant Commerce Clause requires a federal common market.").

344. *See Bibb*, 359 U.S. at 527 (1959) (recognizing the need for national uniformity in the regulations for interstate travel) (citing Morgan v. Virginia, 328 U.S. 373, 386 (1946)); *see also Southern Pac.*, 325 U.S. at 767 (discussing the necessity of a single authority when national uniformity is needed); Cooley v. Board of Wardens, 53 U.S. (12 How.) 299, 319 (1851) (explaining that whenever the nature of a power is national, it requires exclusive legislation by Congress).

345. Welsh, *supra* note 343, at 1014.

Burdensome regulations run afoul of the national interest in the free flow of commerce and are thus logically addressed by Congress under its Commerce Clause[346] and Supremacy Clause power.[347]

Without congressional regulation, the difficult cases of nondiscriminatory burdens on commerce would remain unaddressed. Transportation costs and operating expenses could mount if states were free to regulate on a nondiscriminatory basis without regard to consequential burdens.[348] Yet, these consequential burdens on the national interest are best addressed in a national policymaking forum, not the judicial branch.[349] Moreover, the danger of congressional failure to respond to consequential burdens on interstate commerce might not be that great in at least the transportation field.

VI. ADVANTAGES OF A DISCRIMINATION IN EFFECT MODEL

Aside from this dilemma of nondiscriminatory, burdensome regulations, the proposed model has several advantages over current doctrine. First, state lawmakers will have clear knowledge of the rules defining permissible and

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346. *See* U.S. CONST. art I, § 8, cl.3.

347. *See* U.S. CONST. art. VI, § 2 ("[T]he laws of the United States which shall be made in Pursuance [of the Constitution] . . . shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."). Professor Tribe writes that "[s]o long as Congress acts within an area delegated to it, the preemption of conflicting state or local action—and the validation of congressionally authorized state or local action—flow directly from the substantive power of the congressional action coupled with the supremacy clause of article VI." TRIBE, *supra* note 179, at 479.

348. *See, e.g., Raymond Motor Transp.*, 434 U.S. at 439 n.14 (burden on one interstate carrier was more than $2 million annually); *Bibb*, 359 U.S. at 525 (burden ranged from $4,500 to $45, 840 per carrier); *Southern Pac.*, 325 U.S. at 772 (burden of about $2,000,000 per year for railroads).

349. *See* Bendix Autolite Corp. v. Midwesco Enters., 486 U.S. 888, 897 (1988) (Scalia, J., concurring) ("Weighing the governmental interests of a State against the needs of interstate commerce is, by contrast, a task squarely within the responsibility of Congress . . . and 'ill suited to the judicial function.'" (citing CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69, 95 (1987)) (Scalia, J. concurring in part and concurring in the judgment)); Morgan v. Virginia, 328 U.S. 373, 387 (1946) (Black, J., concurring) ("I think that whether state legislation imposes an 'undue burden' on interstate commerce raises pure questions of policy, which the Constitution intended should be resolved by the Congress."); Eule, *supra* note 14, at 436 n.57 (pointing out that Justice Douglas viewed Congressional authority as "paramount" for preventing burdensome regulations in field of interstate carrier regulation). *But see* H.P. Hood & Sons, Inc., v. Du Mond 336 U.S. 525, 545-46 (1949) (Black, J., dissenting) ("[I]t is inconceivable that Congress could pass uniform national legislation capable of adjustment and application to all the local phases of interstate activities that take place in the 48 states.").

Under this proposed discrimination in effect model, for example, the Arizona regulation in *Southern Pacific* would have been upheld absent evidence of discrimination. *See Southern Pac.*, 325 U.S. at 784-95 (Black, J., dissenting).

impermissible regulation. Absent congressional regulation, the Court will review a regulation for discrimination in effect. If a state regulation discriminates in effect, then clear presumptions will flow from the character of the regulation. Thus, the need to second-guess the Court's balancing calculus will be eliminated.[350]

Second, the model allows for flexibility in the judicial decisionmaking process while maintaining these clear presumptions. Whether a regulation is presumed permissible or impermissible is rebuttable by contrary evidence of the nature of discriminatory effect plus discriminatory purpose or the lack thereof. Thus, the Court will have the flexibility to respond to the particular facts of each case without the encumbrance of rigid *per se* rules that have proven unworkable.[351]

Third, congressional regulation should increase in nontransportation areas.[352] For the reasons discussed earlier, congressional activity should be welcomed in areas in which the flow of commerce is burdened. Congress has the power under the Commerce Clause to regulate uniform rules for the country.[353] More importantly, Congress has the unique expertise for making what are essentially policy decisions about the national interest in the free flow of trade.[354]

This Subsection has discussed the dilemma of nondiscriminatory burdensome regulations as well as advantages of the proposed model. The model presumes a judicial blindness to nondiscriminatory burdens on interstate commerce. Disputes about consequential burdens on commerce may delay triggering a congressional response until the political process forces a response. Accordingly, burdens could fester longer under the proposed model than current doctrine.[355]

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350. *Compare* TRIBE, *supra* note 179, at 419 (discussing Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429 (1978), wherein "Wisconsin made no effort to rebut a massive array of evidence showing that the [truck-length] regulation made no real contribution to highway safety") *with* Kassel v. Consolidated Freightways, 450 U.S. 662, 671-72 (1981) ("Iowa made a more serious effort to support the safety rationale of its [truck length] law than did Wisconsin, but its effort was no more persuasive.").

351. *Compare* City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978) ("Thus, where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected." (citations omitted)) *with* Exxon Corp. v. Governor of Md, 437 U.S. 117, 125 (1978) (holding that a regulation that has effect of protecting in-state independent dealers from out-of-state competition does not discriminate against interstate commerce at the retail level).

352. GUNTHER, *supra* note 343, at 226.

353. *See supra* note 3 and accompanying text.

354. *See supra* notes 333-49 and accompanying text.

355. *Cf.* Eule, *supra* note 14, at 436 ("Under the Court's present standard, the likelihood of judicial invalidation increases with the degree of burden imposed by state law, and the weight of the national interest. But this is precisely the situation in which action by Congress or administrative agencies is most likely."). Eule implies that the timing of political and judicial

This disadvantage is outweighed by a number of certain advantages under the proposal. A series of clear presumptions will better define permissible and impermissible regulation. Unworkable *per se* rules will be discarded in favor of flexible rebuttable presumptions. Finally, the national interest in the flow of commerce would be furthered by congressional decisionmaking, not judicial decisionmaking. With clear rebuttable presumptions rooted in precedent, the "'negative side' of the Commerce Clause [would be less] hopelessly confused."[356]

VII. CONCLUSION

The hunt for advantage pervades Commerce Clause jurisprudence. Scholars and justices recognize this quest but the quarrel has been about whether judicial review should be discarded or reformed. This Article has argued that the Court must ask questions about commercial disadvantage to interests without a regulating state. While scholars might continue arguing whether wrong answers are better than no answer at all from the Court, this Article presumes the best answer of all is the right answer . . . to the right question.

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intervention against burdensome regulations might be similar.

356. Kassel v. Consolidated Freightways, Corp. 450 U.S. 662, 706 (1981) (Rehnquist, J., dissenting).